

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE NORTHEAST OHIO COALITION)
FOR THE HOMELESS, et al.,)

Plaintiffs,)

vs.)

CASE NO. 2:06-CV-00896

JON HUSTED, in his official)
capacity as Secretary of)
State of Ohio, et al.,)

Defendants.)

TRANSCRIPT OF BENCH TRIAL - VOLUME 2

BEFORE THE HONORABLE ALGENON L. MARBLEY, JUDGE
THURSDAY, MARCH 17, 2016; 8:30 A.M.
COLUMBUS, OHIO

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFFS:

SUBODH CHANDRA, ESQ.
CAROLINE GENTRY, ESQ.
DONALD J. McTIGUE, ESQ.
SANDHYA GUPTA, ESQ.
ANA CRAWFORD, ESQ.

FOR THE DEFENDANTS:

RYAN L. RICHARDSON, AAG
SARAH E. PIERCE, AAG
TIFFANY L. CARWILE, AAG
BRODI J. CONOVER, AAG
ZACHERY P. KELLER, AAG

COURT REPORTERS:

DENISE N. ERRETT
DARLA J. COULTER
(614) 719-3029

Transcript recorded by mechanical stenography, transcript
produced by computer.

I-N-D-E-X

VOLUME 2

PLAINTIFFS' WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
EBEN McNAIR	4	28	62	--
ANTHONY PERLATTI	141	65	--	164
TIMOTHY M. P. BURKE	197	168	--	214
ZACHARY WEST	221	236	255	--

- - -

(In Columbus, Franklin County, Ohio, Thursday, March 17, 2016, 8:30 a.m., in open court.)

THE COURT: Good morning, everyone. And happy St. Patrick's Day to one and all!

Mr. McTigue, it's appropriate that you should start us off today.

MR. McTIGUE: Yes, although I didn't wear my green tie.

THE COURT: I was wondering. Mr. Chandra, Mr. Conover and I wore green ties.

MR. McTIGUE: I'm in mourning. I have to be here.

THE COURT: Okay.

And I take it, Ms. Richardson and Mr. McTigue, that you were able to meet and work through some of the exhibit issues.

And, Ms. Gentry, I take it that you and Ms. Carwile have worked out something; is that right?

MS. GENTRY: Actually, Your Honor, that examination is being handled by Ms. Gupta.

THE COURT: Okay.

MS. RICHARDSON: And Mr. Keller, as well.

THE COURT: Ms. Gupta and Mr. Keller are going to work on those?

MS. RICHARDSON: Yes.

MS. GUPTA: We're working on it.

THE COURT: All right. Do you want to call your first

1 witness, then, Mr. McTigue?

2 MR. McTIGUE: I call Eben McNair.

3 THE COURT: Mr. McNair, please come forward and be
4 sworn.

5 (Witness sworn.)

6 COURTROOM DEPUTY CLERK: Please be seated, sir.

7 Are you going to need water this morning?

8 THE WITNESS: I would appreciate it.

9 - - -

10 EBEN MCNAIR,

11 AFTER HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

12 DIRECT EXAMINATION

13 BY MR. McTIGUE:

14 Q. Mr. McNair, could you state and spell your full name?

15 A. Eben Orlando McNair, IV. E-b-e-n, O-r-l-a-n-d-o,
16 M-c-N-a-i-r.

17 Q. Okay. And you also go by Sandy, correct?

18 A. Correct.

19 Q. Okay. Mr. McNair, let's start by giving the Court some
20 background on your -- or some information on your background in
21 elections.

22 A. I was on the Board of Elections from approximately May
23 of 2007 until the end of February of this year. Before that, I
24 did election protection work.

25 You want more detail, or is that enough?

1 Q. Well --

2 THE COURT: Which Board of Elections was that?

3 THE WITNESS: I'm sorry, Your Honor. Cuyahoga County.

4 THE COURT: All right.

5 BY MR. McTIGUE:

6 Q. So, from 2007 'til March of this year, you were a member
7 of the Board of Elections, correct?

8 A. End of February, correct.

9 Q. End of February. Okay.

10 During that time, did you ever serve as Chair of the
11 Board?

12 A. I would -- I served as Acting Chair on occasion, but not
13 as -- I was never formally the chair.

14 Q. Okay. And you are also an attorney, licensed in Ohio,
15 correct?

16 A. Yes.

17 Q. Now, are you familiar with Senate Bill 205 and Senate
18 Bill 216?

19 A. Generally, yes.

20 Q. Okay. And did you provide written testimony to the
21 General Assembly with regard to those two bills?

22 A. Yes.

23 Q. Okay. I would like to -- I'm going to show you an
24 exhibit. This is Plaintiffs' Exhibit 1217. It will be on
25 the -- should end up being on the monitor in front of you.

1 Would it be easier for you to have a hard copy of this?

2 A. Probably.

3 Q. Okay.

4 THE WITNESS: Will I find it in here?

5 BY MR. McTIGUE:

6 Q. No. This is Exhibit 1217. It's going to be in a later
7 binder.

8 THE COURT: What exhibit number is that? P1217?

9 MR. McTIGUE: 1217.

10 THE COURT: That's P1217, isn't it?

11 MR. McTIGUE: Yes, P1217.

12 THE COURT: Thank you.

13 MR. McTIGUE: Volume 20.

14 COURTROOM DEPUTY CLERK: That's 1167.

15 I'm sorry. What was the exhibit number?

16 MR. McTIGUE: 1217, Volume 20.

17 THE WITNESS: Thank you.

18 Yes. I have it in front of me.

19 BY MR. McTIGUE:

20 Q. Okay. Could you -- What you have in front of you is a
21 three-page document; is that correct?

22 A. Yes.

23 Q. Okay. Could you look at all three pages and then tell
24 us if this is a true copy of the written testimony, your
25 written testimony?

1 A. Yes, it is.

2 Q. Okay. And this is the written testimony that you
3 submitted to the House Policy and Legislative Oversight
4 Committee?

5 A. Yes.

6 Q. On Senate Bill 216?

7 A. Correct.

8 Q. Okay. Now --

9 THE COURT: 1217.

10 MR. McTIGUE: Pardon?

11 THE COURT: No, I was telling Ms. Clark it was 1217.

12 BY MR. McTIGUE:

13 Q. So, with respect to your testimony, your testimony was
14 in writing only, right? Not oral?

15 A. Correct.

16 Q. And what prompted you to send in written testimony to
17 the Senate committee?

18 A. I was concerned about the changes to the law that were
19 being considered because I thought that those changes would be
20 adverse to good voter election administration.

21 Q. And did you have specific concerns?

22 A. Well, in this testimony -- I gave other testimony, but
23 this testimony related to the wrong church/wrong pew issue.
24 And my view that the legislation didn't go far enough in terms
25 of wrong church/wrong pew; that the Legislature should consider

1 when they're in the wrong, voting in the wrong church or in the
2 wrong location where one can demonstrate that that occurred
3 because of poll-worker error, which is an issue we track in
4 Cuyahoga County. And it was clear to me, based upon our
5 tracking, that there was substantial poll-worker error in the
6 sense that poll-workers were not properly directing voters, not
7 only not to the correct precinct when they were in the correct
8 location, but not even directing them to the correct location
9 when they were in the wrong location. So, that was the first
10 part of my written testimony.

11 Q. Okay. And what else did your testimony address?

12 A. Senator Seitz was proposing to reduce the number of days
13 after the election where a provisional ballot could be
14 corrected and be counted. I had read in the press that he was
15 doing this because he thought it was a burden on boards of
16 elections. And Cuyahoga County has the largest jurisdiction,
17 and it was really no burden on us. I mean very, very few
18 people came in on the days he wanted to cut back, days eight,
19 nine and ten. So, it just seemed to me that it was -- either
20 he was -- well, he was simply, in my view, mistaken in his
21 assessment that this was in any way a burden on boards of
22 elections. It's a very few number of voters; but, from an
23 elections administration perspective, there was no reason to
24 not allow those votes to be counted if they could be fixed on
25 days eight, nine and ten after the election.

1 Q. And so we're clear what we're talking about here, we're
2 talking about provisional voters being able to come into the
3 boards of elections to supply an ID or correct an ID issue that
4 they had with regard to their provisional affirmation form?

5 A. Correct, when it's a correctable mistake, yes. And the
6 last -- the last concern I raised was the additional
7 requirements that were being discussed to be added to the law
8 with respect to the ballot envelope. I believe it was the
9 birthdate and address, that those were now going to become
10 fatal fields if they weren't properly filled out. And my
11 concern is that would unreasonably disenfranchise voters.

12 Q. And, again, we're talking about provisional ballots,
13 correct?

14 A. Yes.

15 Q. I want to go back to something you said regarding the
16 first issue, which was that the Cuyahoga County Board of
17 Elections was tracking wrong precinct provisional votes. Can
18 you elaborate on what the Cuyahoga County Board was doing?

19 A. Well, we tracked not only people who were voting in the
20 wrong precinct and correct location, but also people that were
21 voting in the wrong location. My view in reading the election
22 cases that had come out is that there was very little actual
23 evidence about what was going on in the field on Election Day.
24 Why were people -- Why was that happening?

25 And so I wanted our Board and the other Board members

1 agreed that we would -- we would track that. And what
2 we -- what we found is that it really is, from our -- my -- our
3 perspective, poll-worker error, because the poll-workers were
4 directed that if somebody was in the wrong location, they were
5 to so note that. And in virtually every instance when somebody
6 was voting in the wrong location, that was not being noted by
7 our poll-workers. So, either our poll-workers didn't know that
8 those individuals were voting in the wrong location, or they
9 were not following the express directions that we had given
10 them, which was to so note that. So, in either way, either
11 way, poll-workers were committing error, from my perspective.

12 Q. So, in Cuyahoga County, then, are the poll-workers
13 instructed by the Board or the Board staff that trains them to
14 notate in some way when a voter comes into the wrong polling
15 location and is supposed to be sent to another building,
16 another location?

17 A. Yes. They're supposed to note that this -- this voter
18 was -- was directed to go to a different polling location and,
19 nonetheless, voted at this wrong polling location. It's a part
20 of the training we do. It's in our election poll-worker
21 training manual.

22 Q. And where are they supposed to make that notation?

23 A. I -- I believe it's on the provisional ballot.

24 Q. On the form?

25 A. On the form, yes.

1 Q. Okay. So, is this an added requirement, or is this a
2 requirement that Cuyahoga does that isn't done statewide?

3 A. Yes.

4 Q. Okay. So, it was something initiated by your Board?

5 A. Yes.

6 Q. I see.

7 A. By me, yes.

8 Q. Okay.

9 A. The Board agreed, yes.

10 Q. Now, with respect to the shortening of the time period
11 by three days, you've already testified that very few -- the
12 experience was, when it was ten days, there would be very few
13 voters that would come in on days eight, nine and ten?

14 A. Correct.

15 Q. Okay. So, for the additional voters that did come in,
16 though, on days eight, nine and ten, did that increase in any
17 substantial way the cost of operating the Board of Elections?

18 A. No. It was a de minimus number of people who came in,
19 and it was -- I mean, it didn't increase, I would say, our cost
20 at all. It was simply staff handling -- There was a de minimus
21 number of individuals.

22 And I think the Senator had said he was concerned about,
23 if the election were close and it would come down to those
24 provisionals, that by shortening it, people wouldn't have to
25 wait as long for the next presidential election to get the

1 results, but we have to wait ten days anyway. So, it
2 didn't -- it didn't -- shortening the time period did not in
3 any way shorten our getting out results with respect to the
4 final count as to counting provisionals.

5 Q. In fact, that's the next question I was going to ask.
6 So, let me follow up on what you've just said.

7 Under the old law -- in other words, pre-Senate Bill
8 216 -- and under the current law, provisional ballots cannot be
9 opened and counted until after ten days after the election,
10 correct?

11 A. Correct.

12 Q. Okay. So, shortening that time period for voters to
13 come in and -- provisional voters to come in and fix an ID
14 issue doesn't speed up the processing of provisional ballots?

15 A. Correct. They're completely separate issues.

16 Q. Okay. It doesn't allow the Board to get the official
17 canvass done earlier?

18 A. It does not, because that ten-day period that we must
19 wait has not changed.

20 Q. Okay. Now, I also want to go back to the third issue,
21 which is the mandatory fields. And you've mentioned that the
22 new law made birthdate and address mandatory, that previously
23 it wasn't mandatory, correct?

24 A. Yes.

25 Q. Okay. So, after this law went into effect, did this law

1 have any impact in resulting in ballots, provisional ballots,
2 being rejected based on those fields?

3 A. Yes. We get -- We get reports as to why provisionals
4 are rejected. And in the November 2015 election, we
5 rejected -- I believe the number was 75 -- provisional
6 ballots/envelopes that we would not have rejected before the
7 new law went into effect. And I believe most of those related
8 to no birthdate being filled out.

9 Q. So, let me follow up on that, on the date of birth
10 issue.

11 You're saying that most of those related to not having
12 any birthdate filled in at all?

13 A. Correct.

14 Q. Okay. So, it was -- the space was blank?

15 A. Yes.

16 Q. Okay. Were there some, as well, where the birthdate was
17 there but there was an error?

18 A. Well, I know that there were some that came before the
19 Board because, as part of the new law, as I recall, if all the
20 other fields are otherwise filled out but there is a problem
21 with the birthdate, that can come before the Board; and if
22 three Board members agree that it otherwise is proper, we can
23 count it, which -- I don't know -- frankly, didn't make any
24 sense to me. I don't know why, if there is something that's
25 blank and there is no information on it, that gets

1 disqualified. But if there is a document that has
2 misinformation on it, you can still count it. But that's the
3 law, and we followed it as best we could.

4 Q. Well, with regard to the provisional ballots where the
5 birthdate field had an error of some kind --

6 A. Yes.

7 Q. -- you said those came before the Board?

8 A. Yes.

9 Q. Did the Board count those ballots?

10 A. Generally, we did. You know, we saw a number of those.
11 I don't -- I can't remember any one that we did not count.

12 Q. Okay. And taking that a step further, you mentioned
13 that the new law provides that, upon a vote of three Board
14 members, the Board can choose to, essentially, ignore a problem
15 with the birthdate?

16 A. Yes.

17 Q. Has the Board, Cuyahoga Board, set any kind of formal
18 policy that that's what they will do?

19 A. No.

20 Q. Okay.

21 A. We've taken them as they've come.

22 Q. Okay. And you also mentioned that you did not -- it's
23 your understanding that the Board doesn't have that same
24 discretion, by the vote of three members, when the birthdate
25 field is blank?

1 A. Correct. My understanding is, the way that we process
2 those is, they don't come before the Board, and they're deemed
3 to be not valid and not countable.

4 Q. And do you know where that -- where that understanding
5 comes from, whether -- has it been in writing or verbally
6 explained?

7 A. That's my understanding of what the law requires. Now,
8 whether that is something we've gotten from counsel or if
9 that's a directive, frankly, I don't know, sitting here. I
10 would have to go back and research that.

11 Q. Okay. And, by "counsel," you would be referring to the
12 County Prosecutor's Office?

13 A. County Prosecutor's Office and/or if we received some
14 counsel from the Secretary of State's regional attorney
15 assigned to us.

16 Q. Okay. Now, with regard to Exhibit 1217, you've already
17 indicated that this is a true and authentic copy of your
18 written testimony to the committee, correct?

19 A. Yes.

20 MR. McTIGUE: Okay. At this point, Your Honor, I
21 would move the admission of Plaintiffs' Exhibit 1217.

22 THE COURT: Any objection, Ms. Richardson?

23 MS. RICHARDSON: Your Honor, we do object on relevance
24 and hearsay grounds as stated in our motion in limine.
25 Understanding the Court's ruling on that motion, we have no

1 further objection, other than it's our understanding that it
2 will not be offered for the truth of the matter.

3 THE COURT: That's correct. That is correct.

4 MS. RICHARDSON: Thank you, Your Honor.

5 THE COURT: All right. It will be admitted.

6 MR. McTIGUE: Okay. Thank you.

7 BY MR. McTIGUE:

8 Q. Now, Mr. McNair, you also submitted testimony, written
9 testimony, on Senate Bill 205, correct?

10 A. Yes.

11 Q. And could you give the witness Exhibit 1269,
12 Plaintiffs' -- P1269, or it may be in the same book.

13 A. Yes, it is.

14 Q. Okay. Thank you.

15 THE COURT: Excuse me, Mr. McTigue. Is that gentleman
16 a witness who just came in?

17 MS. GENTRY: Your Honor, he is a paralegal with our
18 office.

19 THE COURT: All right.

20 MS. GENTRY: Thank you.

21 BY MR. McTIGUE:

22 Q. And this is a six-page document, correct? If you could
23 look at all six pages.

24 A. Yes.

25 Q. And is this a true and authentic copy of your written

1 testimony to the Senate State Government Oversight and Reform
2 Committee on Senate Bill 205?

3 A. Yes.

4 Q. Okay. And explain what prompted you to submit written
5 testimony on Senate Bill 205.

6 A. There is, I think, a general thrust in the Legislature
7 to have rules with respect to how boards of elections would run
8 that would be uniform at a level of detail that I thought was
9 contrary to good election administration, was contrary to the
10 history in the State in terms of the discretion boards of
11 elections had, ignored the extreme differences in the various
12 boards of elections, the problems that they had or the issues
13 they had to address, because the counties were so -- were so
14 diverse.

15 And I thought that, at least with respect to the OAEO,
16 they improperly -- they did not understand the law. And I
17 thought that was having some effect on how the Legislature was
18 looking at this requirement, or lack of requirement, of
19 uniformity. So, I wanted to lay out my view as to why I
20 thought that the major cases did not require the kind of
21 uniformity that was being considered by the Legislature.

22 Q. And, for the record, OAEO is the Ohio Association of
23 Election Officials?

24 A. Yes. And then I -- The Secretary of State has also
25 taken this position. He had done it, in particular, with

1 respect to early voting. He had taken this position with
2 respect to the vote-by-mail program that we had. These were
3 all initiatives that helped us, in Cuyahoga County, run
4 elections, I think, much better if you focus on the
5 presidentials. Two Thousand Four was a very, very bad election
6 administration experience in Cuyahoga County. And by making
7 changes between then and 2008 and 2012, we were doing things
8 that no other county was doing. It helped us, I think, run
9 much better elections, in particular on the presidential and
10 relieving the pressure that occurs during an Election Day for a
11 presidential election.

12 Q. And what types of things were you doing in Cuyahoga
13 County that other counties were not?

14 A. Well, we -- we had a vote-by-mail program, which we sent
15 unsolicited vote-by-mail applications to a large swath of the
16 voters; and then we paid for the postage back if they filled
17 those out. If they then requested a vote-by-mail ballot and we
18 sent it to them, we would then pay the postage back to us. And
19 at the time we started it, I don't think any other county did
20 so. Other counties followed us thereafter, and then we were
21 prohibited from doing that. And I think that was a mistake.
22 It was a mistake by the Secretary of State. It was a mistake
23 by the Legislature.

24 And I think, similarly, there was press for uniformity
25 with respect to early in-person voting. Again, that was a

1 program that we were aggressive about, and, again, that was cut
2 back, in part, on this notion of uniformity, that all of the
3 boards should be open at the same time on the same days. And
4 at the end of my testimony, on the last page I point out why
5 this simply doesn't work. The Secretary of State had issued
6 uniform hours; and for our county, anyway, he simply
7 issued -- he had us being open at the times people weren't
8 coming in to vote and had us close during times that we had
9 historical evidence that showed that that is when people would
10 come to vote. And we provided that evidence; and it was, from
11 our perspective, ignored.

12 Q. And let me direct your attention, as well, to the last
13 paragraph of your testimony. And it appears, there, that
14 you're discussing again the issue of what we have been
15 referring to as the five fields.

16 A. Correct.

17 Q. Okay. And just elaborate what your concern was here,
18 because now we're talking about absentees.

19 A. Right. So, the same -- the same issue occurred, my
20 understanding, with the proposed legislation for absentees as
21 it did for provisionals. And, again, by making these fields
22 basically mandatory, or fatal if there were a mistake, there
23 was no reason to do that from a good elections administration
24 perspective. It would only cause the disenfranchisement of
25 voters when we otherwise knew that that was a valid -- that

1 contained a valid ballot because we had sufficient information
2 to compare the other three fields in our database to know that
3 that was -- that was a ballot that should be counted.

4 Q. And, in fact, with regard to the absentees, date of
5 birth is on the application form already, correct?

6 A. Yes.

7 Q. Okay. And do you recall if date of birth was also
8 on -- Before Senate Bill 205, do you recall if date of birth
9 was on the ID envelope for absentee ballots?

10 A. I believe it was, but I'm now speculating a bit.

11 Q. But do you know, in any event, the boards of elections
12 did not -- before 205, at least -- did not reject any absentee
13 ballots based on a lack of a birthdate?

14 MS. RICHARDSON: Objection.

15 THE COURT: Basis?

16 MS. RICHARDSON: Leading.

17 THE COURT: Well --

18 MR. McTIGUE: I'm calling him on cross.

19 THE COURT: Well, he's being called as upon cross
20 pursuant to 611. He is identified with an adverse party, and
21 so that was the Court's ruling previously. So, he's allowed to
22 lead this witness.

23 MS. RICHARDSON: Your Honor, may I request a side-bar?

24 THE COURT: Yes, you may.

25 (Thereupon, the following proceeding was held at side-bar.)

1 MS. RICHARDSON: Your Honor, Mr. McNair is no longer a
2 member of the Board of Elections, and it's my understanding
3 that he's being offered here today not to provide Board
4 testimony but to speak about the opinions that he personally
5 submitted on his own behalf in support of or in opposition to
6 the legislation that is actually being challenged here. So,
7 this witness is not aligned with the Secretary of State and, in
8 fact, has taken positions directly contrary to the laws that
9 are here.

10 MR. McTIGUE: Well, with regard to the written
11 testimony that he submitted to the General Assembly that he was
12 acting in a personal capacity, I think it may even say it's not
13 on behalf of the Board of Elections. He's speaking for
14 himself. However, I'm also asking him questions regarding what
15 the Board -- when he was on the Board, what was the Board's
16 practices with regard to, well, in this case, this question of
17 absentee ballots. And that's in his capacity as a former
18 elections official.

19 THE COURT: Okay. My position had been that these
20 boards of elections witnesses and the ones that were here
21 yesterday were still with the boards of elections. So, they
22 were identified with an adverse party under Rule 611. I was
23 unaware until you just brought -- well, I was aware, based on
24 his testimony today, that he's no longer with them; he left the
25 Board of Elections in February of this year, I believe it was.

1 So, the mere fact that he's testifying about his duties
2 with the Board of Elections at the time that he was with them,
3 but is no longer with them, does not bring him within Rule 611
4 proscription about -- or prescription, I should say -- about
5 being able to lead a witness who is identified with an adverse
6 party.

7 So, I'm going to sustain your objection. Mr. Eben
8 McNair doesn't fall under the Court's previous order because
9 he's no longer identified with an adverse party. And so you're
10 going to have to take him as upon direct.

11 MS. RICHARDSON: Thank you, Your Honor.

12 (The following proceedings were had in open court.)

13 THE COURT: Please continue, Mr. McTigue.

14 MR. McTIGUE: Thank you, Your Honor.

15 THE WITNESS: Your Honor, may I supplement an answer I
16 gave earlier to give a more complete answer?

17 THE COURT: Certainly, you may.

18 THE WITNESS: With respect to this Exhibit 1269, the
19 other reason, I think, is best summarized in the
20 second-to-the-last substantive paragraph in my written
21 testimony, which is, I think, both the Secretary of State and
22 the Legislature were focused on the wrong end of the election
23 process. They were focused on uniformity at the front end.
24 And that's a profound mistake in my view. What we should have
25 been looking at is focusing on uniformity at the back end; that

1 is to say, making sure that everybody had the same good
2 Election Day voting experience across the counties, that there
3 were no long lines, et cetera. And so that was another
4 important aspect of my written testimony.

5 Thank you.

6 MR. McTIGUE: Your Honor, at this time, I would
7 actually -- I'd like to move admission of Plaintiffs' Exhibit
8 1269.

9 THE COURT: Any objection to 1269?

10 MS. RICHARDSON: The same objections previously noted.

11 THE COURT: Your objection is noted. 1269 will be
12 received.

13 MS. RICHARDSON: Thank you.

14 BY MR. McTIGUE:

15 Q. Okay, Mr. McNair, while you were on the Cuyahoga County
16 Board of Elections and prior to Senate Bill 205 becoming
17 effective, if an absentee voter left the birthdate field blank
18 on their ID envelope, what was the Board's practice in terms of
19 whether to count it or not count it?

20 A. We would count it.

21 Q. And what was the Board's practice if there was some
22 inconsistency in the date of birth with the voter registration
23 records?

24 A. My understanding is that we would count it.

25 Q. Okay. I would like next for you to look at Plaintiffs'

1 Exhibit 1233.

2 A. Yes.

3 Q. Okay. And that's a three-page document, correct?

4 A. Four, I think.

5 Q. Yes. I'm sorry. Four.

6 And can you identify what this document is?

7 A. Yes. This is an e-mail I sent to the Secretary of
8 State. It was a part of a series of e-mails I sent again
9 raising the concerns that I had with respect to
10 disenfranchising otherwise eligible electors for voting in
11 either the wrong location or the wrong -- at the wrong precinct
12 in the right location.

13 Q. And this e-mail is specifically to Ms. Gretchen Quinn,
14 correct?

15 A. Yes. Gretchen Quinn, at the time, was the regional
16 attorney from the Secretary of State's Office assigned to us.
17 And then I copied Mr. Damschroder, who was the number two
18 person in the Secretary of State's Office. Our lawyers,
19 Marilyn Jacobcik, who was the regional liaison from the
20 Secretary of State's Office assigned to us, and then the other
21 people, are all internal Cuyahoga County Board of Elections
22 Board members or employees.

23 Q. And, in summary, this e-mail again expresses your
24 concerns about not counting ballots, provisional ballots, cast
25 in the wrong polling location?

1 MS. RICHARDSON: Objection.

2 THE COURT: Basis?

3 MS. RICHARDSON: Leading and hearsay.

4 THE COURT: Sustained.

5 Rephrase your question, Mr. McTigue.

6 MR. McTIGUE: Certainly.

7 BY MR. McTIGUE:

8 Q. Can you summarize what the principal point is of the
9 e-mail?

10 A. The principal point was to try and assist the Secretary
11 of State's office to give the Secretary of State specific facts
12 with respect to these issues so it would help, hopefully,
13 better inform the Secretary of State's office in terms of the
14 decisions that were being made with respect to people who were
15 either voting in the wrong location or at the correct location,
16 wrong precinct and to note that a lot of this, from my
17 perspective and what I think this document tries to document,
18 is this arises from poll-worker error. Poll-workers were
19 not -- and there are poll-workers -- were not giving voters the
20 correct information to assist them to vote at the correct
21 precinct.

22 Q. This particular e-mail, this is a true and accurate copy
23 of the e-mail that you sent?

24 A. Yes. And, again, it was part of my attempt to argue
25 that, where we could demonstrate poll-worker error, that we

1 shouldn't disenfranchise otherwise eligible electors in terms
2 of counting their votes.

3 MR. McTIGUE: Your Honor, at this time, I would move
4 admission of Plaintiffs' Exhibit P1233.

5 THE COURT: Any objection?

6 MS. RICHARDSON: We do object, Your Honor, on hearsay
7 grounds.

8 THE COURT: Could you put 1233 back up?

9 MR. McTIGUE: Yes.

10 THE COURT: All right. Your objection is noted, but
11 overruled.

12 MS. RICHARDSON: Thank you, Your Honor.

13 THE COURT: P1233 will be admitted.

14 BY MR. McTIGUE:

15 Q. Now, Mr. McNair, while you were a member of the Board of
16 Elections, do you know whether or not the Board made attempts
17 to contact absentee voters regarding missing or incorrect
18 information on their ID envelopes?

19 MS. RICHARDSON: Objection. Leading.

20 THE COURT: Overruled.

21 MS. RICHARDSON: Thank you, Your Honor.

22 THE WITNESS: I -- Yes, it was the 11-S form that we
23 sent them.

24 BY MR. McTIGUE::

25 Q. To your knowledge, did the Board make attempts to

1 contact these absentee voters by other means other than Form
2 11-S?

3 A. Yes. I believe that we tried other means, and then this
4 issue was raised with the Secretary of State, and he forbade us
5 from contacting people by calling them on the phone or
6 e-mailing them or otherwise trying to communicate with them in
7 a way that was more expeditious than through mail.

8 MS. RICHARDSON: Objection. Hearsay.

9 THE COURT: Overruled.

10 BY MR. McTIGUE:

11 Q. Do you know what the practice of the Cuyahoga County
12 Board of Elections is with respect to providing or not
13 providing any assistance to provisional voters in completing
14 the provisional affirmation form?

15 A. That changed over time. I'm not exactly sure when that
16 change occurred. But I think originally the law was that the
17 poll-workers, the election officials, were to complete that
18 information. And then the law changed so that the elector was
19 to complete that information.

20 I would say, generally, in Cuyahoga County, we have a
21 culture of trying to assist electors. So, if an elector were
22 filling out the information and had a question or concern, we
23 would direct our people to assist in trying to get that
24 completed. So, that's kind of a general summary, I think, of
25 our position.

1 Q. Do you know whether the poll-workers are instructed to
2 review the provisional ballot affirmation form for completeness
3 before it's cast?

4 A. I don't know.

5 Q. Okay.

6 MR. McTIGUE: Your Honor, could I have a moment?

7 THE COURT: Yes, you may.

8 (Whereupon, there was a brief interruption.)

9 MR. McTIGUE: No further questions, Your Honor.

10 THE COURT: Thank you, Mr. McTigue.

11 Ms. Richardson?

12 MS. RICHARDSON: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MS. RICHARDSON:

15 Q. Good morning, Mr. McNair.

16 A. Good morning.

17 Q. My name is Ryan Richardson, and I represent the
18 defendants in this case, the Ohio Secretary of State and the
19 State of Ohio.

20 Mr. McNair, are you affiliated with a particular
21 political party?

22 A. Yes.

23 Q. What is that party?

24 A. Democratic Party.

25 Q. And you hold several positions for the Democratic Party;

1 is that correct?

2 A. For the party in Cuyahoga County, yes, I do.

3 Q. What positions do you hold?

4 A. I'm a precinct committee person. I'm an executive
5 committee person, I'm the city leader of my local community. I
6 am counsel to the party. I am parliamentarian for the party.
7 I sit on the chairs cabinet.

8 Q. Is it correct to say that you are general counsel for
9 the Cuyahoga County Democratic Party?

10 A. I am counsel for the Party, yes.

11 Q. Thank you. Earlier --

12 A. I guess -- That's an unpaid position.

13 Q. Thank you.

14 Earlier, you described various testimony that you
15 submitted to the General Assembly on S.B. 205 and 216; is that
16 correct?

17 A. Yes.

18 Q. And that was testimony that you provided in your
19 personal capacity, correct?

20 A. I think -- it's -- it's a tricky situation. I think I
21 said it was -- I wasn't speaking officially as a Board member,
22 because the Board -- the Board only acts through the four
23 members. But it was informed by my work on the Board, I would
24 say, principally. So, I think the simple answer to your
25 question would be "yes."

1 Q. And, in fact, you expressly noted in Plaintiffs' Exhibit
2 1269, which was your testimony regarding S.B. 205, "My
3 testimony today reflects my personal thoughts." Do you see
4 that listed there? Do you still have the exhibit in front of
5 you?

6 A. Yes, I see what you have put up. So, I wanted to be
7 clear that I was not speaking for the Board. But -- So, in
8 that sense, yes, I was speaking personally; but my comments
9 were really almost completely informed by my experience on the
10 Board of Elections.

11 Q. But they were your personal views regarding the law? As
12 you stated in the letter?

13 A. Yes. My personal, versus official, taking a position
14 officially as a -- yes.

15 Q. Thank you.

16 You are aware, however, that there were board members
17 from various boards across the State that did believe that S.B.
18 205 addressed many issues in the law, correct?

19 MR. McTIGUE: Objection, Your Honor.

20 THE COURT: Basis?

21 MR. McTIGUE: It's hearsay by the nature of the way
22 the question is worded.

23 THE COURT: I'm not sure that it calls for a hearsay
24 response, but I'm going to ask you to rephrase your question
25 because it's unclear from this witness' background and

1 experience that he would know what board members from various
2 boards across the State would believe. So, it's beyond the
3 scope of this witness' knowledge based on the foundation that
4 is of record at this time. So, the objection is sustained on
5 another basis.

6 MS. RICHARDSON: Thank you, Your Honor.

7 BY MS. RICHARDSON:

8 Q. Mr. McNair, are you aware of whether there were
9 proponents to S.B. 205?

10 A. Yes.

11 Q. Are you aware that some proponents included members of
12 various boards of elections across the State?

13 A. I am not aware.

14 Q. And with respect to S.B. 205, the letter that you
15 submitted to the General Assembly described, primarily, your
16 concerns with respect to the provision of the law that
17 prevented counties from sending their -- sending absentee
18 ballot applications to voters; is that correct?

19 A. I would say it was more general than that.

20 Q. In what way?

21 A. It was trying to address, I think, the more general view
22 of the OAE and the State Legislature and the Secretary of
23 State's perspective that uniformity was required at a level of
24 detail that I believe was not legally correct. That was, I
25 would say, the thrust of the first -- one, two, three --

1 three-and-a-half pages. And then I went into more detail about
2 how that was manifesting itself in various specific provisions
3 that were being considered in the law.

4 Q. So, more generally, you disagreed with the proposition
5 that the Constitution requires perfect uniformity, correct?

6 MR. McTIGUE: Objection.

7 THE COURT: Just a second.

8 THE WITNESS: Sorry, Your Honor.

9 THE COURT: Mr. McTigue?

10 MR. McTIGUE: Constitution requires?

11 BY MS. RICHARDSON:

12 Q. Mr. McNair, did you indicate in your --

13 MS. RICHARDSON: Excuse me. I'm sorry. I will
14 rephrase, Your Honor.

15 THE COURT: All right.

16 BY MS. RICHARDSON:

17 Q. Mr. McNair, in your submission to the General Assembly,
18 did you indicate your opinion that the Supreme Court's
19 decisions do not require perfect uniformity across the boards?

20 A. That's not how I would describe what I wrote.

21 Q. How would you describe it?

22 A. Well, respectfully, as I thought I've already testified,
23 that there was a misapprehension by the OAE0 and the
24 Legislature and the Secretary of State regarding the level of
25 specificity and uniformity that is required. In my view, the

1 cases certainly permitted much more diversity, especially where
2 there was a rationale for that diversity.

3 Q. And the cases you discussed in your letter included the
4 Supreme Court's decision in Bush v. Gore, correct?

5 A. Yes.

6 Q. And if you would turn to Page 4 of Plaintiffs' Exhibit
7 2380, at the beginning of the second paragraph, you provided
8 your opinion that, under this case law, quote, Where a
9 rationale is presented for the complaint about lack of
10 uniformity, the courts are deferential to those decisions. Did
11 I read that correctly?

12 A. You did.

13 Q. And part of the reason, in your view, that some
14 uniformity is necessary is because there are significant
15 differences between the various boards and counties across the
16 State; is that correct?

17 A. I'm sorry. Would you restate the question?

18 Q. Sure. Part of the reason that you believe that
19 uniformity is not required on all levels is because there are
20 significant differences in the county boards of elections
21 across the State; is that fair?

22 A. That the county boards of elections face very different
23 issues from one county to another, yes.

24 Q. And, among those, some of the 88 counties across the
25 state, like Cuyahoga County, for example, are very large

1 counties, correct?

2 A. Yes.

3 Q. Others, however, are very small. Would you agree with
4 that?

5 A. Yes.

6 Q. And, as a large county, Cuyahoga County has far more
7 resources than many of the smaller counties across the State,
8 correct?

9 A. Yes.

10 Q. And, in fact, are you aware that there are some Boards
11 that have just a few individuals on their permanent staff?

12 A. Yes.

13 Q. Approximately how many individuals did you have on
14 permanent staff while you were at the Cuyahoga County Board of
15 Elections?

16 A. I think it was about 96.

17 Q. And you would acknowledge that some of the various items
18 that you have proposed might be more difficult for smaller
19 counties, correct?

20 A. I was proposing that counties be able to address these
21 issues at the level that each county thought was appropriate,
22 mindful of the particular problem that they faced, the staffing
23 that they had, and to acknowledge, generally, the diversity of
24 each county. So, you know, for us, long lines is always a very
25 big concern for presidential elections. And for other

1 counties, they don't have that concern.

2 Well, I think we should be allowed to address our
3 concerns in a more robust way. For example, having extended
4 early voting hours, that shouldn't be required. The fact that
5 we need this doesn't mean it should be imposed upon some other
6 small county who really can't meet that requirement. That's
7 why my view is we should, you know, focus on the back end:
8 What is it that we have to do to run fair elections where
9 people don't have to wait in long lines? How do we accomplish
10 that goal? For us in Cuyahoga County, the answer may be very
11 different than it is for a small county.

12 Q. And so, for example, you testified that, for Cuyahoga
13 County, with approximately 96 staff members, it was not a major
14 problem to process provisional ballots between day seven and
15 ten after the election, correct?

16 A. Well, it wasn't a major problem, because we had so few
17 people come in. And so I was dumbfounded by Senator Seitz's
18 comments. We're the largest county. We have very few people
19 come in. So -- and, presumably, we would have the most come
20 in, because we're the most populous county.

21 So, it seemed that would be a de minimus issue for any
22 county, no matter how large or small.

23 Q. You don't know what burden it might be for a very small
24 county with just a few members of staff on hand to process
25 provisional ballots during those last few days, correct?

1 A. Well, I would -- no. I would -- I mean, common sense
2 tells me that if we have very, very few in Cuyahoga County, a
3 county that is much, much smaller than us would have, you know,
4 you could count them on one hand, if you had any.

5 Q. And aside from your speculation in that regard, you
6 haven't done any particular study to confirm that that's the
7 case for smaller counties, correct?

8 A. Correct. I've performed no studies on that issue.

9 Q. You haven't reviewed any data or statistics regarding
10 how many individuals would be impacted in some of these smaller
11 counties, correct?

12 A. Correct.

13 Q. And you don't know what the burden would be for those
14 smaller counties, correct?

15 A. No. I testified why I believed that there would be no
16 burden on those counties.

17 Q. One of -- I'd like to turn, specifically, to the issue
18 of provisional ballots more generally for a moment, and one of
19 the issues that you described earlier in your testimony today,
20 and also in your testimony to the General Assembly, was the
21 issue of wrong location/wrong precinct votes; is that correct?

22 A. Yes.

23 Q. Can you describe what wrong location/wrong precinct
24 means very briefly?

25 A. Based upon where somebody lives, they are to vote at a

1 particular precinct in a particular location. Some people go
2 to the correct location, but that location has multiple
3 precincts in it; and while they're at the correct polling
4 location, somehow they end up voting at the wrong precinct in
5 that multi-precinct location.

6 The other instance would be somebody goes to simply the
7 wrong polling location and they should be at a different
8 polling location where their precinct is where they should
9 vote.

10 Q. And the reason that it's important to know what precinct
11 a voter lives in is because the ballots actually differ based
12 on the precinct, correct?

13 A. They can, yes.

14 Q. And so there may be issues or candidates that are
15 specific to a particular precinct, correct?

16 A. Yes. I mean, I should be clear that my view that where
17 there's poll-worker error and it should be counted, as my
18 testimony, I think, makes clear, that those -- the ballots
19 should be counted only where that person is otherwise a
20 qualified elector to vote. So, presidential, Senate, the
21 most -- most issues or races are common across the county. If
22 they're not and the person votes something they shouldn't vote
23 on, then, obviously, it shouldn't be counted, whether they're
24 in the correct location or not.

25 Q. And can you describe, just as a logistical matter, how

1 you would count only those votes relating to issues that a
2 person outside of the precinct is qualified for?

3 A. Well, I mean, we do that now. We take those -- I mean,
4 I would defer to staff in terms of logistically how they do
5 that. But we find somebody voted in the wrong precinct now.
6 And then we would go through it and make sure that there was
7 nothing, you know, where they should have voted. And so then
8 we know if there's anything on the ballot that they did vote
9 that they weren't otherwise qualified for. And if that's the
10 case, we would remake that ballot so it would only show the
11 races that they were qualified to vote.

12 Q. And so I'd like to break that down a little bit. Is it
13 fair to say that --

14 A. I'm sorry. I am assuming we'd remake the ballot. I
15 would have to check with staff to see if that's exactly what we
16 would do; but, in any event, we would only count -- I think we
17 would remake the ballot, because then we'd have to scan it
18 again.

19 Q. So, to break that down, essentially what a board would
20 have to do is first determine which issues and candidates the
21 particular voter was eligible to vote for. Is that fair?

22 A. Yes.

23 Q. And then they would have to actually go through and
24 remake the ballot, correct?

25 A. If it turned out that the person, the elector, voted for

1 some candidate or some issue that they weren't otherwise
2 qualified for. But, you know, that generally -- I mean, that's
3 the exception; that's not the rule. The rule is typically
4 if -- It's pretty rare in the same location, for example, that
5 the substance is going to be different in terms of what they're
6 voting for. We do have -- I mean, we even have some split
7 precincts that we have to be mindful for.

8 Q. Would you be surprised to learn that in many counties
9 the ballots differ significantly based on individual local
10 issues that are precinct specific?

11 A. Well, that -- I mean, that can happen. I -- I guess
12 I -- I don't want to confuse the periphery with the core.
13 That's all.

14 Q. And in each of those cases, the Board would have to
15 essentially remake the ballot to reflect only those issues and
16 candidates that the voter is eligible to vote for, correct?

17 A. Yes, and we do that now.

18 Q. And you do that now for ballots that were cast in the
19 wrong location?

20 A. No, in the correct, the correct location, the wrong
21 precinct.

22 Q. And so now just focusing specifically on the wrong
23 location situation that we've been discussing; in order to make
24 the changes that you propose, the boards would to additionally
25 remake any ballots that were cast in the wrong location; is

1 that fair?

2 A. Yes, but I want -- again, I want to be clear that I -- I
3 was urging that only when there was demonstrated poll-worker
4 error. And so if our poll-workers have not identified that
5 person to be in the wrong location, as they're required to do,
6 frankly, I think that's really on us as an agency. As an
7 agency, we should have poll-workers that are directing people
8 to the correct location.

9 Now, as a practical matter, when you're hiring 5,000
10 people for a one-day event, you're not going to get,
11 necessarily, all the most qualified people that you want. And
12 so one way for us to adjust that problem that you just can't
13 get around because that's how elections work is, we direct our
14 poll-workers to note that they're in the wrong location. And
15 so we know if they don't tell them that, then we've made an
16 error; and we shouldn't disenfranchise people for that.
17 That's -- That's my view of how it would be better to run
18 elections, and that's what I was urging the Legislature to
19 adopt, unsuccessfully; but that's what I was urging.

20 Q. And, in fact, you testified earlier that, in Cuyahoga
21 County, you did implement a rule that requires poll-workers to
22 note if someone is voting in the wrong location, correct?

23 A. Yes.

24 Q. And yet you found that that wasn't happening, right?

25 A. I -- We found that our poll-workers were not --

1 either they weren't following our instructions because they
2 weren't so noting that and allowing that person to vote in the
3 wrong location, or they somehow didn't realize that that person
4 was, in fact, voting in the wrong location, and so didn't
5 implement that part of the instructions that we gave them. But
6 in either event, it was -- the poll-worker made an error either
7 by not following our instructions or not identifying that
8 person as being in the wrong location.

9 Q. So, in essence, based on your experience in Cuyahoga
10 County, in your view, all of those would constitute poll-worker
11 error, correct, regardless of the reason that the individual
12 actually ended up in the wrong location, correct?

13 A. Yes.

14 Q. And you found it very difficult to track, for the issue
15 of wrong location, whether or not a person's arrival at a wrong
16 location was due to poll-worker error, correct?

17 A. What we found is that, the people that were voting in
18 the wrong location, there was no indication that the
19 poll-worker had so noted that.

20 Q. And so you would count all of those ballots, correct?

21 A. In my view, we should count all of those ballots where
22 the elector is qualified to vote on the issues or the
23 candidates for whom they voted.

24 Q. And this process of remaking ballots and counting these
25 ballots for wrong-location voters would happen after the tenth

1 day following the election, correct?

2 A. Yes.

3 Q. And that would be when boards are otherwise processing
4 provisional ballots, correct?

5 A. Yes.

6 Q. And when they're conducting the official canvass?

7 A. Yes.

8 Q. And there are numerous other administrative tasks that
9 take place during that time frame, correct?

10 A. Yes. It's -- I agree with you, it's a busy time.

11 Q. Have you conducted any study to determine what the
12 impact of counting all wrong-location ballots would be for any
13 county?

14 A. I don't have the numbers here, but we do have what those
15 numbers are.

16 What was the Gretchen Quinn exhibit? Do you know which
17 one that was, because that was -- I think there was a
18 hundred -- 109 voters there. So, in that election, there would
19 be 109 -- I believe that was the number -- that we would have
20 to fix. So, it's not a huge number. But, still, it's 109
21 people that got disenfranchised.

22 Q. And have you conducted any review of what the impact
23 would be of requiring a smaller county to remake ballots for
24 every ballot that was cast in the wrong location?

25 A. No, I haven't conducted any such study. The

1 reason -- but that was the reason I was writing the Secretary
2 of State these e-mails to say, here, here is our experience.
3 Please consider this when you think about how to administer
4 elections. And as I think my e-mail to Gretchen Quinn points
5 out, this was one of a series of e-mails that I sent the
6 Secretary of State to which I got no response.

7 Q. And the e-mail that you're referring to is Plaintiffs'
8 Exhibit 1233. That e-mail was sent from your personal e-mail
9 address; is that correct?

10 A. Let me get there. I believe you're correct, but let me
11 just get there.

12 My law firm e-mail address.

13 Q. And it was not sent from a Board address; is that
14 correct?

15 A. Yes. I do not know how to access my Board e-mail
16 remotely.

17 Q. Did you consult the other members of the Board before
18 sending this e-mail?

19 A. I don't have a specific recollection as to the
20 discussions we had back in July of 2012 when I sent this; but,
21 certainly, I talked to my Board members about this. I
22 talked -- I mean, that's why we implemented this program of
23 tracking the wrong location. It was -- So, this was a matter
24 that I brought up at Board meetings. Certainly, this e-mail --
25 and if you go back and find all the other e-mails, I mean,

1 every communication I had with the Secretary of State, I
2 certainly copied my fellow Board members; and, you know, that
3 would generate discussion, sometimes one on one, sometimes --
4 but often at public Board meetings.

5 Q. Thank you, Mr. McNair. And I don't mean to interrupt
6 you, but my question is really more limited.

7 The e-mail that you sent was in your personal capacity.
8 It does not represent a formal opinion of the Cuyahoga County
9 Board of Elections, correct?

10 A. Well, this was not sent in my personal capacity. It was
11 sent as a member of the Board of Elections. And indeed --

12 Q. Mr. McNair, did the Board approve -- excuse me, I'm
13 sorry.

14 Mr. McNair, did the Board approve this e-mail as an
15 official statement of the Board before it was sent to the
16 Secretary of State's Office?

17 THE COURT: Ms. Richardson, you're going to have to
18 let Mr. McNair finish answering this question, because he was
19 answering the question that you asked as you asked. And you
20 may cross-examine him on the answer that you are given, but you
21 can't back away from the answer on the basis of it being
22 nonresponsive because, as I read it, it was being responsive.
23 And I want to hear the rest of that answer.

24 MS. RICHARDSON: Thank you, Your Honor.

25 BY MS. RICHARDSON:

1 Q. And, Mr. McNair, I apologize. I certainly didn't mean
2 to interrupt you. Please complete your answer.

3 THE COURT: I want the record to be clear that you
4 didn't do it in a mean spirit or rude manner; but, just as a
5 matter of practice, I -- he was giving an answer to the
6 question asked.

7 Ms. Errett, would you please read the question back and
8 Mr. McNair's partial answer?

9 (Question and answer read back by the court reporter.)

10 THE COURT: Finish that answer, please, Mr. McNair.

11 THE WITNESS: Yeah. My recollection is that, as I
12 look at this -- This was several years ago -- but, on page 2,
13 it talks about these 109 instances. So, I remember sitting
14 with staff and actually going over those provisional ballot
15 envelopes. And to do that, I needed Democrat and Republican.
16 My recollection, it was Betty Edwards and Tony Calliger
17 (phonetic), and there were some other staff in the room when I
18 was looking at these. And I discussed with my Board members
19 it's something that I wanted to do. And so I think they were
20 aware of what I was doing, because I wanted to understand on
21 really a voter-by-voter basis what was going on with this
22 problem. So they knew.

23 BY MS. RICHARDSON:

24 Q. Thank you, Mr. McNair. So, if I understand your
25 testimony correctly, you had informed your various Board

1 members of your personal views, and you copied them on the
2 e-mail, correct?

3 A. Certainly, I did at least that. My normal practice
4 would be, if I was going to do this, I would have invited one
5 of my Republican colleagues to join me, if he wanted to. But I
6 don't have a specific recollection that I did this with respect
7 to this particular project that I did.

8 Q. Thank you. And, in fact, looking just at the e-mail
9 itself, there is no indication that the views of any other
10 Board member are expressed in this e-mail, correct?

11 A. Correct.

12 Q. And there is no indication that the Board ever voted on
13 the content of this e-mail, correct?

14 A. Correct.

15 Q. And in your written testimony on S.B. 216, Plaintiffs'
16 Exhibit 1291, you specifically addressed this issue of --

17 A. I'm sorry. What is that exhibit number again?

18 Q. Sure. It's Plaintiffs' Exhibit 1291.

19 A. I don't seem to have it.

20 Q. Oh, maybe there's -- Actually, I think there may be
21 multiple copies. I think the one in front of you might be
22 Plaintiffs' Exhibit 1217.

23 COURTROOM DEPUTY CLERK: Which one do you want, 1217
24 or 1291?

25 MS. RICHARDSON: I believe he has 1217 in front of

1 him.

2 THE WITNESS: I have 1217, yes. Thank you, Counsel.

3 MS. RICHARDSON: 1217 will work. Thank you very much.
4 It's a duplicate. I apologize.

5 THE WITNESS: Yes.

6 BY MS. RICHARDSON:

7 Q. And as we've discussed, you mentioned this wrong
8 church/wrong pew -- or wrong-location issue in this letter,
9 correct?

10 A. Yes.

11 Q. And in this letter, you acknowledged that there are
12 differences in the role of a General Assembly, with respect to
13 election laws, than the role of courts, correct?

14 A. Yes.

15 Q. And you acknowledge in this letter that counting wrong
16 location votes is not a constitutional requirement as you
17 understand the applicable case law, correct?

18 A. I'm not sure I said that. Where did I say that?

19 Q. I would ask you -- I would direct your attention to the
20 second page, and about halfway through the second complete
21 paragraph.

22 A. Yes.

23 Q. There is a sentence that begins: This Legislature
24 approaches voting rights from a very different perspective. Do
25 you see that?

1 A. No.

2 I'm sorry. Yes, I see it now.

3 Q. And your point there is that, while wrong-location votes
4 are not required to be counted as a constitutional matter, you
5 urge the General Assembly to adopt that approach as a
6 legislative matter; is that fair?

7 A. I think, actually, I -- I can see how you would infer
8 that; but I was -- I think I was trying to hedge my bets a bit
9 more than that.

10 Q. How so?

11 A. I guess it's not clear to me, as a constitutional
12 matter, if being in the wrong -- voting in the wrong place and
13 not counting that where there's clear poll-worker error, if
14 that's not a constitutional violation. I mean, I'm a lawyer.
15 I was mindful of the SEIU v. Husted Sixth Circuit decision,
16 which I think certainly went the other way, although I think
17 that's been vacated now.

18 But, as I also note in that case, it was done under
19 great duress and without, I think, sufficient facts developed
20 for the court. And that's really what I was trying to do in
21 the Gretchen Quinn e-mail, was to try and develop kind of
22 what's really going on out in the field, because I don't think
23 the -- at least the earlier cases, there was a lot of
24 discussion about what was going on out in the field; and, to
25 the extent to which voters were being not served well by

1 poll-workers on many occasions, even those poll-workers are
2 trying to do the very best job they can under very trying
3 circumstances.

4 Q. But you don't disagree with what you wrote in the letter
5 that you submitted to the General Assembly that there is a
6 difference from the role of the General Assembly in examining
7 these issues and the role of the courts in evaluating
8 constitutionality, correct?

9 A. Yes. My point, generally, was that the Legislature can
10 do, arguably, much more to protect voters than what the
11 Constitution requires, and the Legislature should take that
12 approach.

13 Q. And this letter reflects your views, as a legislative
14 matter, of the policies that you would have liked to have seen
15 implemented, correct?

16 A. Well, no. That's -- I don't think I would really quite
17 describe it that way. It was really -- As I said earlier, it
18 was my view that the -- that the Legislature and the Secretary
19 of State and the Ohio Association of Election Officials
20 misunderstood basic propositions of the Constitution and what
21 was or was not required with respect to uniformity. And I was
22 trying to give my view as to trying to assist those, that
23 audience, in re-looking at how they were approaching this
24 problem.

25 Q. So, you were expressing your view that uniformity is

1 not -- should not be required in all instances, correct?

2 A. That's an imprecise way to put it. But, yes, the answer
3 to your question would be "yes."

4 Q. And one of the other issues that you have also discussed
5 is a -- the issue of wrong-precinct votes that take place in
6 the right location. Do you understand what I mean by that?

7 A. Yes.

8 Q. And is that a fair characterization?

9 A. I'm sorry. Would you ask the question again?

10 Q. Sure. Let me -- I'll rephrase.

11 You are aware of the issue of votes that have been cast
12 in the wrong precinct but right location, correct?

13 A. Yes. My understanding was that the legislation was,
14 basically, going to put into the legislate -- put into law that
15 part of the SIEU v. Husted case that dealt with the right
16 church/wrong pew issue.

17 Q. In other words, it would codify the ruling that those
18 votes should count, correct?

19 MR. McTIGUE: Objection.

20 THE COURT: Basis?

21 MR. McTIGUE: Calls for a legal conclusion.

22 THE COURT: Overruled.

23 You may answer.

24 THE WITNESS: Yes. Unless the elector had been
25 properly counseled by the poll-worker and told that they should

1 go vote in a particular precinct and the elector refused, then
2 that wouldn't count. And I -- frankly, I don't -- so, that's
3 what the law said. I, frankly, don't recall if the SEIU vs.
4 Husted case had that addition to it.

5 BY MS. RICHARDSON:

6 Q. And you are aware that one of the things that S.B. 216
7 did was to allow the boards of elections to consolidate poll
8 books at multi-precinct voting locations, correct?

9 A. I believe that's true. It's not something I focused on,
10 because it's not something we were interested in doing in
11 Cuyahoga County.

12 Q. And by consolidating poll books at multi-precinct voting
13 locations, it eliminates the concern about voters going to the
14 wrong precinct within the right location, correct?

15 A. No.

16 Q. Where the poll books are consolidated at a
17 multi-precinct location, someone from any precinct within that
18 location will be on the same poll book, correct?

19 A. I -- I believe that's true. We tried this as an
20 experiment in Cuyahoga County, and it did not work. And I'm
21 trying -- I think, because our -- our poll-workers were then
22 pulling the wrong -- some of them were pulling the wrong
23 ballots. So, it did not address the issue of the voter getting
24 the right ballot. We -- that was -- you know, that was many
25 years ago now, but it did not work for us. It works much

1 better in a DRE county, but it -- it can cause, and did cause,
2 confusion, at least in our county, because we have optical
3 scan, and it was a problem with getting -- notwithstanding
4 doing that, there was a problem -- I don't specifically recall
5 now, but the voter was still getting the wrong ballot too
6 often. And so we abandoned that approach.

7 Q. And are you aware of whether other counties have had a
8 very different experience with respect to consolidated poll
9 books?

10 A. My understanding is it works well in the DRE counties,
11 but it does not work well, at least for us, as I just said,
12 where you have a paper ballot.

13 Q. But you don't disagree that, in many counties across the
14 State of Ohio, consolidating poll books eliminates the issue
15 with respect to wrong precinct ballots, correct?

16 A. In DRE counties, my understanding is that that is a very
17 helpful change.

18 Q. You also mentioned the Ohio Association of Election
19 Officials, correct?

20 A. Yes.

21 Q. And that is a bipartisan organization comprised of
22 election administrators across the State, correct?

23 A. I think that's how they describe themselves.

24 Q. And, in fact, it is comprised of equal numbers of
25 Democratic and Republican members of the boards, correct?

1 A. I'm sorry. Ask that again.

2 Q. Are you aware of whether the Ohio Association of
3 Election Officials is comprised of equal numbers of Democratic
4 and Republican board administrators?

5 A. My understanding is that that also includes board
6 members, as well.

7 Q. Thank you. But an equal -- it is a bipartisan board
8 comprised of both Democratic and Republican members, correct?

9 A. It has an equal number of Democrats and Republicans, who
10 are either election officials or Board members.

11 Q. And you mentioned this, I believe, already; but the Ohio
12 Association of Election Officials supported several aspects of
13 the laws that are challenged here, correct?

14 A. I -- I don't know that I mentioned that. My
15 understanding was, in one of my written testimonies, they had
16 published a summary, I think, of recommendations which I
17 thought were fundamentally misinformed legally, and so I talked
18 to them about that. And, after talking to them about that, I
19 became even more convinced that they had been misinformed
20 legally and that -- on this uniformity issue. And so that was
21 kind of part of what animated me to deal with this in the
22 Legislature.

23 And I know that the OAEU was upset that the Legislature
24 only picked -- it only picked certain parts of that
25 recommendation. The OAEU's view was that it should be

1 implemented wholesale, and that's not what the Legislature did,
2 and there were officials of the OAE0 that were upset about
3 that.

4 MS. RICHARDSON: Your Honor, I would move to strike
5 the last part of that where he's testifying on what the
6 specific recommendations were on hearsay grounds.

7 THE COURT: Let me hear you at side-bar on that.

8 Mr. McTigue?

9 (Thereupon, the following proceeding was held at side-bar.)

10 THE COURT: Mrs. Errett, read back the last question,
11 please.

12 Go ahead.

13 (The last question was read by the court reporter.)

14 THE COURT: What you wanted is that last clause, that
15 the officials of the OAE0 were upset about that, is that what
16 you asked to be stricken?

17 MS. RICHARDSON: And, Your Honor, the part immediately
18 prior to that where, as I understood his answer, he's
19 testifying as to what they told him.

20 THE COURT: Okay.

21 MS. RICHARDSON: I believe my question was much more
22 limited than that, whether he was aware they had supported
23 aspects, not calling for the content of their specific
24 recommendations.

25 THE COURT: Okay.

1 MR. McTIGUE: Yeah, I mean, I think it's within the
2 scope of answering the question, but he couldn't answer the
3 question "yes" or "no," but --

4 THE COURT: And he answered most of the question.

5 MR. McTIGUE: Yes.

6 THE COURT: But he talked about what the AOEO --

7 MS. RICHARDSON: OAE0.

8 THE COURT: OAE0. Okay. I'm going to sustain the
9 objection.

10 MS. RICHARDSON: Thank you, Your Honor.

11 THE COURT: Yes.

12 MR. CHANDRA: Because we represent separate and
13 distinct parties in terms of NEOCH and CCH, from time to time
14 we may want to lodge evidentiary objections to questions that
15 are being asked or answers that are given on behalf of our
16 clients even though we weren't the questioning party
17 originally. Is that okay with the Court, for us to be able to
18 preserve our record with respect to a separate objection,
19 stating the basis for it?

20 THE COURT: That presents somewhat of a conundrum
21 because, on the one hand, you're trying this case jointly, and
22 you've designated various people to examine the witnesses. And
23 I gave the plaintiffs the leeway to examine -- four different
24 attorneys to examine the same witness. That attorney is acting
25 on behalf of the different parties. So, you represent SEIU,

1 for instance, and Mr. McTigue is representing the Ohio
2 Democratic Party. You're representing different interests, and
3 you may conduct different --

4 MR. CHANDRA: It's not going to happen often. But
5 what is happening is, just our ability to communicate in
6 real-time is limited. Sometimes Don isn't seeing an issue I'm
7 seeing.

8 THE COURT: I will allow that --

9 MR. CHANDRA: Very judiciously.

10 THE COURT: -- on a very limited basis. And you have
11 to make it clear to me that, you know, they're divergent
12 interests. So you have to protect that interest, because I can
13 see a circumstance in which your interest and the Democratic
14 Party's interest may be different; and so certain evidence that
15 may come in against him should not come in as against you.

16 MR. CHANDRA: We'll sit together and try to
17 coordinate, but I just wanted to be sure.

18 THE COURT: That would be a unique circumstance, but I
19 will permit it.

20 Do you have any objection you want to make for the
21 record, Ms. Richardson?

22 MS. RICHARDSON: Your Honor, only that, if we are
23 receiving objections from numerous attorneys, that it does seem
24 like we will be hampered in our ability to conduct our
25 questioning.

1 THE COURT: Yeah. So I will handle it on a
2 case-by-case basis, but you are going to need to be explicit as
3 to why your interests diverge. And you may, you know, object
4 independently of Mr. McTigue.

5 (The following proceedings were had in open court.)

6 THE COURT: Ms. Richardson, please continue.

7 MS. RICHARDSON: Thank you, Your Honor.

8 BY MS. RICHARDSON:

9 Q. Mr. McNair, I understand that you have testified today
10 and in your witness submissions that we've discussed that you
11 personally disagree with the policies reflected in these laws,
12 but I want to ask you a very limited question. You are aware
13 that there are others who have offered various rationale for
14 these laws, correct?

15 A. In favor of these laws?

16 Q. Correct.

17 A. Well, I'm aware of Senator Seitz's comments that I cite
18 to. I don't know that I am aware of anything else here today.

19 Q. And in fact, even today in your testimony, you have
20 identified two rationales that were offered. And I understand
21 that you personally disagree, but one of the rationale that
22 you've mentioned already today that was offered in support is
23 the uniformity, correct?

24 A. Well, I don't -- I guess, on the reduction from ten to
25 seven days, I don't think uniformity was -- that wasn't the

1 thrust -- there was already a uniform rule. So I wasn't
2 questioning whether there should be a uniform rule there. So,
3 I would say, no, uniformity was not the issue in that case.

4 With respect to the five fields, there already was
5 uniformity. So, my objection wasn't to uniformity. My
6 objection was creating additional requirements for no good
7 elections administration purpose that would unreasonably and
8 unfairly disenfranchise individuals, including the 75 I talked
9 about earlier in Cuyahoga County at the November 2015 election.
10 The uniformity arguments really dealt more with the Vote By
11 Mail Program and Golden Week, which really haven't been the
12 focus, I don't think, of your questions or Mr. McTigue's
13 questions.

14 Q. Mr. McNair, I appreciate that you disagree with the laws
15 and the policies that are reflected, and I understand that you
16 disagree with the point regarding uniformity. My question is
17 simply this: You don't disagree that one of the rationales
18 that were offered by proponents of this bill is that it would
19 help increase uniformity, correct?

20 A. Well, I don't want to appear truculent, but the
21 uniformity issue was focused -- my recollection is it was
22 focused on the arguments with respect to Golden Week and the
23 Vote By Mail program, not the fields issue, because that
24 already was uniform. So I don't think people were complaining
25 about, or it wasn't -- so uniformity wasn't a rationale there.

1 Q. With respect to the five-fields issue that you bring up,
2 I believe you testified earlier that even before these laws
3 were passed, birthdate and address were fields that appeared on
4 the absentee ballot, on the absentee ballot envelope, correct?

5 A. Yes.

6 Q. And are you aware of whether because those fields were
7 included on the envelope the view in some counties was that
8 they were, in fact, required prior to passage of the laws in
9 this case?

10 A. I don't know.

11 Q. And are you aware of whether there was confusion about
12 which fields were actually required because of the discrepancy
13 between the forms themselves and the law at that time?

14 A. There was not confusion in Cuyahoga County. I can't
15 speak for the confusion or lack thereof in other counties.

16 Q. One of the issues you testified about in your letter to
17 the General Assembly with respect to Senate Bill 205 was
18 the --

19 A. I would call it written testimony.

20 Q. -- with your written testimony -- Thank you for that
21 clarification -- was the issue of statewide mailings, correct?

22 A. Let me get back here.

23 Yes.

24 Q. And you point out in that letter -- and, again,
25 understanding that you disagree -- but you point out in that

1 letter that proponents of the bill had identified greater
2 uniformity as one of the reasons for implementing this
3 requirement, correct?

4 A. Maybe I did. I forget that. Can you just point to
5 where that is --

6 Q. Sure.

7 A. -- in my testimony?

8 Q. And, in fact, I think there are several references
9 throughout the letter. If you look at the second paragraph on
10 the first page --

11 A. Second paragraph, yes.

12 The Court concluded? That paragraph?

13 Q. I believe it starts with "The principal thrust."

14 A. I'm on page 2. I'm sorry. Where are you?

15 Q. And maybe we can --

16 A. Excuse me. I mean, I did -- I think I already
17 acknowledged that uniformity was an issue with respect to
18 Golden Week and Vote By Mail.

19 Q. Golden Week was not an issue that was covered in either
20 of the two laws that are challenged here, correct?

21 A. Well, that, I don't recall. Let me say, more generally,
22 I guess, in-person early voting.

23 Q. And is it your understanding that either of the laws at
24 issue in this case made any changes to early voting hours?

25 A. I don't -- I don't know. I don't believe so.

1 Q. And one of the other rationale that were offered in
2 support of the laws that are at issue in this case is the
3 decrease in burdens on county elections administrators,
4 correct?

5 A. I -- Boy! I'm not sure I believe you are correct. I'm
6 not sure.

7 Q. You testified earlier today that, while you disagree
8 with the point, you are aware that one of the rationale that
9 was offered in support of the changes to the cure period
10 related to the burden on various county boards of elections,
11 correct?

12 A. The cure period. I'm sorry. I thought you were -- I
13 was focused on the provisional and absentee -- Correct.

14 MS. RICHARDSON: Your Honor, may I confer just
15 briefly?

16 THE COURT: Yes, you may.

17 (Whereupon, there was a brief interruption.)

18 MS. RICHARDSON: No further questions at this time.

19 THE COURT: Any redirect, Mr. McTigue?

20 MR. McTIGUE: Yes, Your Honor.

21 If I may have a moment, Your Honor?

22 THE COURT: Yes.

23 (Whereupon, there was a brief interruption.)

24 REDIRECT EXAMINATION

25 BY MR. McTIGUE:

1 Q. Okay. Mr. McNair, I want to ask you a couple of
2 questions that you were asked by defense counsel related to
3 consolidated poll books.

4 Are you aware that Senate Bill 205 provided that a board
5 of elections could, by a vote of three members, decide to
6 consolidate the poll books in a multi-precinct polling
7 location?

8 A. I'm aware that that was one of the provisions. I don't
9 know which law it was in.

10 Q. Okay. Your board, the Cuyahoga Board, never voted to
11 consolidate the poll books, other than that one -- I think you
12 referred to it as a trial -- that they did sometime in the
13 past?

14 A. Yes.

15 Q. Okay. And that was -- about when was that?

16 A. Jane Platten was still the director. So that was, you
17 know -- I don't know -- five years ago, at least.

18 Q. Okay. And since the new law, Senate Bill 205 and 216,
19 since those two new laws have come into effect, the Cuyahoga
20 County Board has not voted to consolidate the poll books at
21 multi-precinct polling locations, correct?

22 A. Yes, correct.

23 Q. Okay. However, the Secretary of State issued a
24 directive requiring -- sometime in December of last year --
25 requiring boards to do that, correct?

1 A. I don't know that.

2 Q. Okay. Now, you were also asked some questions -- Well,
3 before I go on, let me -- let me make sure we're clear on the,
4 what the problem was on the consolidated poll books. You
5 indicated that because it -- because Cuyahoga is an all paper
6 ballot county, that there were problems with -- I'm -- with
7 what?

8 A. Well, my recollection is vague on this issue, but I
9 believe that there was a problem about then, after somebody
10 signed in, because everything was consolidated, that they
11 might, the voter might, get the -- get the wrong ballot at the
12 next stage of the process, because now all the ballots were
13 kind of consolidated in one place. So, they're all lined up
14 together, whereas before they would be segregated by precinct.

15 Q. I see. Okay.

16 Now, turning our attention to the questions you were
17 asked regarding the five fields, and specifically the
18 requirements regarding address and date of birth on the
19 absentee envelope and on the provisional affirmation form, you
20 previously testified that the Board of Elections in Cuyahoga
21 County did not disqualify either absentee voters or provisional
22 voters when that information was either missing or did not
23 match the provisional ballot, or -- I'm sorry -- did not match
24 the voter registration database; is that correct?

25 A. That's certainly true with respect to the date of birth.

1 I believe it was also -- it also was true -- well, I mean, Vote
2 By Mail, I think we had to get the right address back when
3 there was the request for the ballot, but not when we got the
4 envelope, the absentee ballot, back. So your statement's
5 correct.

6 Q. Okay. And is it fair to say, then, that the Cuyahoga
7 County Board was able to properly identify the eligibility of
8 that voter to cast that ballot without having that information?

9 A. Yes.

10 MR. McTIGUE: Thank you.

11 THE COURT: Ms. Richardson?

12 MS. RICHARDSON: No further questions.

13 THE COURT: Any recross?

14 MS. RICHARDSON: No, Your Honor. Thank you.

15 THE COURT: Mr. McNair, thank you very much, sir. You
16 may be excused.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: Ladies and gentlemen, it's 10:25 now.
19 We'll take our morning recess until 10:35.

20 (Recess taken from 10:25 a.m. until 10:35 a.m.)

21 THE COURT: Ms. Gupta, your next witness.

22 MS. GUPTA: Yes, Your Honor. Plaintiffs' calls
23 Mr. Anthony Perlatti.

24 THE COURT: Okay.

25 Mr. Perlatti, please come forward and be sworn.

1 (Witness sworn.)

2 THE COURT: Please proceed.

3 - - -

4 ANTHONY PERLATTI

5 AFTER HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

6 CROSS-EXAMINATION

7 BY MS. GUPTA:

8 Q. Good morning, Mr. Perlatti. You and I just met. My
9 name is Sandhya Gupta. I'm one of the attorneys for
10 Plaintiffs's Northeast Ohio Coalition for the Homeless and
11 Columbus Coalition for the Homeless.

12 Would you please state and spell your name for the
13 record?

14 A. Anthony Perlatti, A-n-t-h-o-n-y, P-e-r-l-a-t-t-i.

15 Q. And what is your position, Mr. Perlatti?

16 A. I am the Deputy Director at the Cuyahoga County Board of
17 Elections.

18 Q. And how long have you been with the Board of Elections?

19 A. I've been employed with the Board of Elections since
20 November of 2007 and in my current capacity of Deputy Director
21 since February of 2013.

22 Q. And what was your position before you were Deputy
23 Director?

24 A. I was the Human Resources Manager.

25 Q. I'm sorry. The Human Resources --

1 A. Human Resources Manager.

2 Q. Okay. And have you held other positions with the Board?

3 A. No, I have not.

4 Q. Okay. Could you describe some of your responsibilities
5 and duties in your current position?

6 A. I am responsible, really, for the administration of
7 elections. So, overseeing -- This is working with the
8 Director, day-to-day operations of the office, preparation for
9 elections, assisting with the writing of internal policies and
10 procedures at the Board, supervising staff, basically managing
11 the operation and then planning the preparations for elections,
12 execution of the election on Election Day, and all the duties
13 that come post election.

14 Q. And are you familiar with the requirements for absentee
15 and provisional ballots?

16 A. Yes.

17 Q. Are you involved in the process of determining whether a
18 ballot should be accepted or rejected?

19 A. I -- So is that for provisionals or absentee?

20 Q. Both.

21 A. Both? We -- I had worked with staff to create the
22 procedures that we have in place. In many of those
23 determinations, the vast majority of the determinations are
24 made by staff at a lower level based on the procedures that we
25 have in place. And then certain instances that don't fit

1 neatly into one of our procedures or the category that's
2 questionable, those then will start to elevate up through the
3 chain of command. And at times I do review some of the
4 absentee ballots that may be in question.

5 Regarding the provisional process, all of the rejected
6 provisionals, the Director and I, we will flip through all of
7 those to make sure that that is, in fact, what we want to
8 present to the Board as being invalid provisionals.

9 Q. And when you say you flip through them, are you doing an
10 independent review of those?

11 A. We're doing a physical site review of the envelopes, and
12 we will do that with the Manager and Assistant Manager of our
13 registration department with us. Those are the individuals who
14 are responsible for reviewing the -- or overseeing the
15 provisional process. And then we will work with them to ask
16 questions as to what is in our registration database for an
17 individual, have them provide us with copies of documents that
18 we may need to further clarify on some issues, on some of the
19 envelopes.

20 Some envelopes are clear-cut: You can see that
21 something is missing. And, per our directive, you can't accept
22 that.

23 There may be others that may be questionable, and then
24 we ask for the information that we need, depending on whatever
25 the particular circumstance is surrounding an envelope.

1 Q. Okay. So, let's talk about the provisional ballot for a
2 moment. What is your understanding of the information that a
3 voter is required to provide on a provisional ballot form in
4 order for that ballot to count?

5 A. Currently, an individual has to provide five pieces of
6 information. They have to provide a printed name, an address,
7 date of birth, a form of ID, and a signature.

8 Q. And do you know whether any of those required categories
9 are a result of recent changes in the law?

10 A. Yes. Two of the five, those two being date of birth and
11 address.

12 Q. Okay. So, just briefly, would you run us through the
13 Board's process for reviewing provisional ballots?

14 A. So, the provisional ballots, we will have a team of
15 employees who will do the initial review. From that initial
16 review, they will have the physical provisional envelope with
17 them; and they'll be seated at a computer terminal, with access
18 to the Cuyahoga County voter registration database as well as
19 access to the statewide voter registration database.

20 They will first view the envelope to see if the five
21 required fields are there. And if all five are, they will go
22 ahead and they will proceed to look into the Cuyahoga County
23 database to see then if they can identify the voter from the
24 information that's provided. If they can and if everything
25 matches and is sufficient, they will go ahead; and they will

1 indicate that that provisional ballot envelope is valid, and
2 then move onto the next.

3 At some point later in the process, an employee of a
4 different political party will come back; and they will -- they
5 will view -- physically view the envelope, then, to ensure that
6 the five required fields are on the envelope. And if they are,
7 we now have had a bipartisan team view that provisional
8 envelope and consider it valid.

9 THE COURT: Mr. Perlatti, when you say that you looked
10 to determine whether the five required fields are on the
11 envelope, do you mean whether they're literally printed on the
12 envelope or whether they have been satisfactorily completed on
13 the envelope?

14 THE WITNESS: Step 1 is, actually, are they physically
15 contained on the envelope, without a review of the database,
16 determining is the information provided correct. Then they
17 will move into that first, but the first is just --

18 THE COURT: To see if the envelope has been printed
19 properly?

20 THE WITNESS: Exactly. Right.

21 THE COURT: Okay.

22 THE WITNESS: That would be the first step.

23 THE COURT: I see.

24 THE WITNESS: And then the second step, you go into
25 the registration database; and, the information they did

1 provide, you know, is that correct? Is that their birthdate?
2 Is that, in fact, the matching signature? And then they will
3 go through. And if all that matches, they then will make the
4 determination that is a valid provisional envelope; everything
5 is correct.

6 THE COURT: All right. Thank you.

7 Please continue, Ms. Gupta.

8 BY MS. GUPTA:

9 Q. Could you continue your response to the question about
10 the process?

11 A. Okay. So, then, as they go through the review against
12 the registration database, if they find that one of those five
13 fields is incorrect, then the employee will indicate where the
14 error exists, in which one of those fields, and mark it as --
15 initially, as invalid.

16 That provisional envelope, we will then take that to a
17 separate quality assurance team and that quality assurance
18 team, will then do a further review of the envelope, or of the
19 information on the envelope, to the database, to then see, the
20 initial determination, was that in fact correct and should the
21 provisional ballot remain invalid, or if they're able to find
22 additional information -- maybe they find something in the
23 statewide that the first person didn't -- they will then go
24 ahead and they will make the change and have that corrected.

25 The first person on the quality assurance team will be

1 of the opposite political party as the person who made the
2 initial verification. And if that quality assurance individual
3 does make a correction, then a second person on the quality
4 assurance team of the opposite political party will view that
5 to -- I guess, to verify that, in fact, the overturning of the
6 initial person's rule is correct and that a bipartisan team
7 agrees --

8 Q. Now, Cuyahoga County, your board, keeps track of who has
9 reviewed a ballot, correct?

10 A. Yes. Each of our operators will have a unique
11 identifier assigned to them so we can track who is touching the
12 ballot as it goes through its process.

13 Q. And that information is kept with the voter's record, or
14 module; is that correct?

15 A. In the -- In the -- In our registration database, the
16 provisional module, there will be a record of who the operator
17 was who worked on the envelope, as well as, physically, on the
18 envelope itself, at the bottom, is a place to indicate the
19 initials of the operator who worked on the ballot, as well as
20 their party affiliation.

21 Q. Okay. And when a ballot is rejected, your staff keeps
22 track of the basis of that rejection, correct?

23 A. We will -- We will indicate the reason for the
24 rejection.

25 Q. And that's also in that same module?

1 A. That will be in the provisional module.

2 Q. Okay. I'm going to ask you questions about the date of
3 birth fields that you mentioned.

4 Now, the law allows boards to accept ballots, despite a
5 date-of-birth mismatch, by a vote of three board members; is
6 that correct?

7 A. That is correct.

8 Q. Okay. And has the Cuyahoga Board adopted a policy of
9 counting any ballots with a date-of-birth mismatch?

10 A. Our Board -- Well, the Board follows the criteria
11 outlined in Secretary of State directive. And so our staff,
12 if -- taking away the date-of-birth field, if the other four
13 required fields are complete and correct and if the month
14 and/or day is wrong on the date of birth, we will bring that to
15 our Board at a meeting and let them know this date of birth is
16 a mismatch and the other four required fields are complete and
17 correct, and therefore recommend that they go ahead and approve
18 those to be counted.

19 And thus far in Cuyahoga County, the Board members have
20 approved for those to be counted.

21 Q. Now, what if the date of birth is missing all together?

22 A. If the date of birth is completely absent, then that
23 provisional envelope is rejected for a missing date of birth,
24 and we do not take that to the Board, recommending approval.
25 It's presented to them as an invalid provisional because of

1 complete missing of the field.

2 Q. Now, the Board can still verify the identity of an
3 individual even without the date of birth, can't it?

4 A. Many times, it can.

5 MR. KELLER: Objection. Speculation.

6 THE COURT: Overruled.

7 THE WITNESS: Many times, they can. In fact, prior to
8 the current law, the previous form of the provisional envelope
9 did not require date of birth, and we were successful in
10 identifying voters without that information and able to
11 validate and invalidate provisional envelopes.

12 BY MS. GUPTA:

13 Q. You just answered my next question, which was going to
14 be, you were able to verify the identity of voters even before
15 the date-of-birth requirement, correct?

16 A. That is correct.

17 Q. And it's the case that the Board can still verify the
18 identity of a voter even though they don't have a correct date
19 of birth written, correct?

20 MR. KELLER: Objection. Speculation. Vague.

21 THE COURT: Overruled. You may answer.

22 THE WITNESS: The Board -- the Board can -- in most
23 instances, they can identify a voter without having the correct
24 date of birth. If you -- If you have a name that you can --
25 Let's say you see their printed name. That's your first piece

1 where you're looking to try to find them. And then, with the
2 ID, that's an indicator to help to match it up. And then,
3 basically, you get to the signature; and the signature is
4 probably the most important piece on there, trying to get a
5 matching signature to the database. And so if we can get that
6 signature to match, then we're confident that that is the
7 person.

8 BY MS. GUPTA:

9 Q. Okay. Now, you also mentioned the current -- the other
10 new requirement is the current address, correct?

11 A. That is the other additional -- yes -- additional
12 requirement that's been added.

13 Q. Now, even if someone -- even if a voter leaves off their
14 current address on their provisional ballot form, your staff
15 can find what the voter's precinct is, can't they?

16 A. If -- Well, if there is no address, we can try to
17 identify the voter in the voter registration database. And
18 then whatever record, whatever the address is on record in the
19 database, that would be the precinct of record that we would
20 have for them.

21 Q. Would you agree that most of the -- Let me start that
22 again.

23 Would you agree that most of the time that a voter has
24 to vote a provisional ballot is because they have asked --
25 they've requested an absentee ballot but not returned it?

1 A. Many voters vote provisional for that scenario where
2 they have requested a Vote By Mail ballot and did not return
3 it.

4 Q. And in those situations, you would have their current
5 address in the database, correct?

6 A. Correct. So, when they had requested the vote-by-mail
7 ballot -- It would have been in the registration database --
8 that would have been viewed to determine which precinct and
9 ballot to mail them, and then it would be that same database
10 that would be used on the provisional verification process.

11 So, it would be the same address that was viewed to send
12 out the vote-by-mail ballot. And then, that same address, that
13 would be used during the provisional process to validate that
14 they, in fact, received the correct ballot.

15 Q. And so those individuals, if such an individual left off
16 their current address on their provisional form, you could
17 still find their correct precinct, correct?

18 A. In that scenario, yes, we could.

19 Q. Okay. And your staff was able to determine the correct
20 precinct even before the requirement for a current address,
21 correct?

22 MR. KELLER: Objection. Mischaracterization.

23 THE COURT: Overruled.

24 You may answer, Mr. Perlatti.

25 THE WITNESS: Yes, they could determine what the

1 precinct was.

2 BY MS. GUPTA:

3 Q. And they could determine this even before the
4 requirement for a date of birth, correct? They could determine
5 the correct precinct even before there was a requirement for a
6 date of birth, correct?

7 A. Correct. Under the -- Under the previous form of the
8 envelope, with the three required fields being printed name,
9 ID, and signature, Cuyahoga County Board of Elections was
10 successful, again, in validating and invalidating provisional
11 envelopes under that set of guidelines, or rules, provided to
12 us.

13 Q. So a voter could leave off both their date of birth and
14 their current address, and staff could still determine that
15 that voter is an eligible voter; is that correct?

16 A. Yes.

17 Q. But the Board currently rejects ballots for an incorrect
18 address even if there is only one number missing from an
19 address; is that correct?

20 A. That is correct. If the address is not complete, then
21 we will determine that to be a fatal flaw; and we'll invalidate
22 the provisional envelope.

23 Q. You don't reject if there is a problem with the zip
24 code, do you?

25 A. I -- I am not -- I am not positive on that. I

1 think -- I do think staff focus more on house number, street
2 name, and city. But I am not positive on the zip code.

3 Q. I'm going to turn to asking you a couple of questions
4 about the identification requirement. If a voter provides a
5 Social Security number on their provisional ballot form but
6 they previously provided a driver's license or other kind of
7 identification and not a Social Security number, then does the
8 Board accept that ballot?

9 A. The Board will just because -- because that -- When a
10 person registers, they're not required to provide both a Social
11 Security number and their driver's license number. They need
12 to provide one of those pieces of information. And, so, what
13 we receive on the registration card is what we will populate
14 the database with.

15 If the person provides the other acceptable form of
16 identification and we don't have a record of that, we don't
17 penalize them and reject them because they provided the
18 alternate form of identification.

19 MS. GUPTA: May I confer, Your Honor, for a moment?

20 THE COURT: Yes, you may.

21 MS. GUPTA: Thank you.

22 BY MS. GUPTA:

23 Q. Thank you. Now, as to the requirement of a printed
24 name, Mr. Perlatti, would the Board reject a ballot for a lack
25 of a printed name even if you could tell, from the signature,

1 what the voter's name is?

2 A. Again, in the provisional processing?

3 Q. Yes.

4 A. Yes, we would, because the printed name is one of the
5 five required fields that have to be present on the envelope.

6 Q. And could you still verify the identity of a voter if
7 all of the other fields were complete and correct?

8 A. Many times, you could.

9 Q. Okay. Mr. Perlatti, I'm going to show you what has been
10 marked as Plaintiffs' Exhibit 1501. This is the -- Just a
11 moment. Do you recognize this document?

12 A. This -- This is the provisional ballot form, I think,
13 12-B.

14 Q. And you are aware that this is the provisional ballot
15 form that was in place before the new requirements?

16 A. Can you slide it up a little bit, please?

17 Yes. The form that we used in Cuyahoga County looked a
18 little bit different than this, but it had the -- This top part
19 was correct. And then we had a registration card, also, on our
20 form.

21 MS. GUPTA: At this time, Your Honor, I'd like to move
22 into evidence Plaintiffs' Exhibit 1501.

23 THE COURT: Any objection?

24 MR. KELLER: No objections, Your Honor.

25 THE COURT: Exhibit 1501 will be received.

1 MS. GUPTA: Thank you.

2 BY MS. GUPTA:

3 Q. Mr. Perlatti, you testified a minute ago that you're not
4 sure, if there is a problem with the zip code, whether that
5 ballot would be rejected or not?

6 A. That's correct.

7 Q. If one of your staff testified in an earlier deposition
8 that such ballots are not rejected, would you have any reason
9 to disagree with that testimony?

10 A. I would not.

11 Q. Now, Cuyahoga provides no notice to a provisional voter
12 to correct any error on their provisional affirmation form,
13 correct?

14 A. That is correct.

15 Q. A provisional voter is able, however, to come in and
16 show a valid ID if the voter did not have a valid ID with them
17 on Election Day, correct?

18 A. That is correct.

19 Q. And they have seven days to do so?

20 A. Yes.

21 Q. They previously had ten days?

22 A. Yes, they did.

23 Q. Now, can someone with an ID mismatch come in to fix that
24 problem within the seven-day period?

25 A. I'm not positive. I do not recall that happening in

1 Cuyahoga, but I don't -- I would have to -- I don't know if
2 they could or couldn't. I would have to research that.

3 Q. And what would you look into to determine whether or not
4 a voter can come in to correct an ID mismatch?

5 A. I would probably first consult with our -- We'll look at
6 the code, potentially with our prosecutor's office, and get
7 guidance from the Secretary of State's -- the legal counsel
8 assigned to our area.

9 Q. Now, as far as you know, nothing besides an ID problem
10 can be corrected, correct?

11 A. Correct.

12 Q. But there wouldn't -- there would be no difference,
13 would there, between allowing someone to fix an ID problem and
14 allowing that person to come in to fix an address or a date of
15 birth or a name problem?

16 MR. KELLER: Objection, Your Honor. Vague.

17 THE COURT: Just a second.

18 Did you say "vague"?

19 MR. KELLER: I did, Your Honor.

20 THE COURT: Mr. Keller, overruled. I think it
21 identifies the areas that Ms. Gupta is inquiring about. So I'm
22 going to allow the question to stand.

23 You may answer, Mr. Perlatti, if you understand.

24 THE WITNESS: Okay. So, the question is --

25 THE COURT: Ms. Errett, please read the question back.

(The last question was read by the court reporter.)

THE WITNESS: I would -- Under -- I believe, under current law, they're not able to do that. But, if the law were to allow someone to come in during that ten-day, or now seven-day, window to cure or to fix something, I mean, we would be able to comply with that.

BY MS. GUPTA:

Q. Okay. Now, poll-workers are supposed to give out a sheet of paper at the poll with a provisional hotline number; is that correct?

A. Correct. I believe it's Form 12-H.

Q. Okay. Now, you don't know whether that's actually provided, do you?

A. I know we print them. So we print them, and we pack them, and we instruct and train the poll-workers to distribute those forms when they give the provisional envelope to the voter.

Q. But you don't actually know whether they follow through?

MR. KELLER: Objection. Asked and answered.

THE COURT: Overruled.

THE WITNESS: I mean, I -- Physically, at a polling location, I haven't been able to view them doing that. I do know that, when the supplies come back at the end of the night, some of the -- some of the packs are ballot, or, the tablets with that form are untouched. And some of them -- some are

1 distributed.

2 BY MS. GUPTA:

3 Q. Okay. Now, Cuyahoga provides notice to all provisional
4 voters whose ballots are rejected, correct?

5 A. Yes. Post election, after certification of the
6 election, we do send out notifications.

7 Q. And this came about at the suggestion of a Board member?
8 Do you know?

9 A. Yes. Former Board Member Debbie Sutherland, she had
10 raised that concern. And I want to say that it may have
11 started in 2012, but I'm not positive of the year.

12 Q. Okay. Now, you've never heard back from anyone to whom
13 a notice was sent out that the individual who cast the ballot
14 was not that person, correct?

15 A. No. I'm not aware of that communication, no, someone
16 coming back and saying, Why did you send this to me; I did not
17 vote provisionally.

18 Q. Okay. So, in other words, since beginning to send
19 notices out, you've not had a situation where a missing piece
20 of information or an incorrect piece of information was the
21 result of an impersonator standing in for a voter, correct?

22 A. I'm not aware of that.

23 Q. In fact, at the same time as the notices are sent out,
24 the Board also sends out registration cards to individuals who
25 had non-matching information so that they can update their

1 registration information, right?

2 A. That is correct.

3 Q. Okay. And you can verify the identity of individuals to
4 whom you send out notices, correct?

5 A. Yes. We have to know who they are in order for us to
6 send something to them.

7 Q. All right. And, just to clarify, the notices we're
8 talking about are the post-election rejection notices?

9 A. Yes.

10 Q. Okay. Mr. Perlatti, I'm going to show you some specific
11 ballots. Let's start with what's been marked as Plaintiffs'
12 Exhibit 2817.

13 Now, let me just -- Do you see, Mr. Perlatti, on this
14 provisional ballot form, that a voter, the voter in question,
15 crossed off the current address form (sic)?

16 A. Yes.

17 Q. Or -- excuse me -- not the form, but the current address
18 field.

19 A. Yes.

20 Q. And this ballot was rejected on this basis. Would you
21 agree?

22 A. I -- I don't know if this was or wasn't. If we look at
23 the bottom, I could probably determine.

24 It looks like that's an "Approved" checkmark at the
25 bottom, I think. It's very small. It's hard to see.

1 MS. GUPTA: Your Honor, if I may have a moment to
2 confer?

3 THE COURT: Yes, you may.

4 MS. GUPTA: Thank you.

5 (Whereupon, there was a brief interruption.)

6 BY MS. GUPTA:

7 Q. Mr. Perlatti, on this ballot, I know you said you
8 weren't sure if this one was rejected, or not, based on the --

9 MR. KELLER: Objection, Your Honor. May I have a
10 side-bar?

11 THE COURT: Yes, you may.

12 (Thereupon, the following proceeding was held at side-bar.)

13 MR. KELLER: Your Honor, it's just been brought to my
14 attention we do not have these exhibits.

15 THE COURT: Okay.

16 MS. GUPTA: Okay. I thought --

17 MS. CARWILE: We're missing a box, I think. We have
18 them ending from the ones you gave yesterday. It ends around
19 2359. Then we have 3200, but we're missing the chunk in
20 between.

21 THE COURT: Okay.

22 MR. CHANDRA: If I can get co-counsel on this, because
23 they produced the documents?

24 THE COURT: Okay.

25 MS. GENTRY: The documents are being copied right now.

1 They'll be here by lunchtime.

2 THE COURT: Okay. And these are the documents that
3 you want to review now with this witness?

4 MS. GUPTA: Correct.

5 THE COURT: Have you already, as I requested, you and
6 Mr. Keller, gone --

7 MS. GUPTA: We have.

8 THE COURT: Okay. Could you go through, then, the
9 documents that you already have gone through? And, then, with
10 respect to documents that you haven't seen, Mr. Keller, they'll
11 give you an opportunity to look at them over lunch.

12 MR. KELLER: Your Honor, we may be able to clarify
13 here if you can tell me -- because they were categorized
14 earlier in the exhibit list, but then re-categorized later. If
15 you can tell me that everything you're going to talk about is
16 on the earlier exhibit list, it's just a different number --

17 MS. GENTRY: Yes.

18 MS. GUPTA: That's right.

19 MR. KELLER: I wanted to make sure.

20 MS. CARWILE: Do we have Bates numbers?

21 MS. GUPTA: They do. And I can mention that when I
22 examine the witness.

23 MR. KELLER: I appreciate that.

24 THE COURT: So you have -- Does that clarify things?

25 MR. KELLER: I think we can keep going.

1 THE COURT: You withdraw your objection?

2 MR. KELLER: Yes.

3 THE COURT: Okay. Then, you can -- If another exhibit
4 comes up that doesn't fall in the category, then you can -- we
5 can deal with that when you get to it.

6 MR. KELLER: That's my only other issue. It's we
7 won't necessarily know in the time it takes. So, I mean, we
8 just have to rely on opposing counsel, which that's fine; but
9 that's my only reservation.

10 THE COURT: Is there some way, Ms. Gupta, that you can
11 identify the documents so that he'll know whether it's one of
12 the documents that you've already discussed or whether it's one
13 of the ones that is being copied?

14 MS. GUPTA: Sure. Just to clarify, we did actually
15 talk about a stipulation for the range of voter files that are
16 listed.

17 THE COURT: Okay.

18 MS. GUPTA: The difference between what has previously
19 been produced and what is currently being copied is that the
20 current version breaks down all the documents by voter file.
21 So, the defendants actually have the complete set. It's just
22 that they don't have them broken down.

23 The way to remedy this right now is, if I give you the
24 Bates number, then you will know which document I'm referring
25 to.

1 THE COURT: Okay. So they have the documents, just
2 not in the order that you are referring to them now?

3 MS. GUPTA: That's right.

4 THE COURT: Okay.

5 MS. GUPTA: You won't have the exhibit number that
6 they are associated with.

7 THE COURT: I see. But you can give them the Bates
8 number?

9 MS. GUPTA: I can.

10 THE COURT: That will identify the particular document
11 that they currently have?

12 MS. GUPTA: That's right.

13 THE COURT: All right. Let's do that.

14 MS. GUPTA: Would you like me to do that right now, in
15 advance, or would you --

16 THE COURT: Let's do it as we go. That way, we can
17 continue to move along.

18 And then if, Mr. Keller, you have a problem locating the
19 document, then we can pause for him to locate it.

20 But you can put the documents, also, in the Elmo, so
21 that he can look at it, and the Bates numbers can be
22 coordinated.

23 All right. Thank you.

24 (The following proceedings were had in open court.)

25 BY MS. GUPTA:

1 Q. Mr. Perlatti, this exhibit that we've been looking at is
2 Bates number Cuyahoga 654. And we were beginning to follow up
3 on this document.

4 Now, I understood that you weren't able to tell
5 directly, looking at this document, whether it was rejected
6 based on the crossed-off address, correct?

7 A. Yes. In this example that you provided, what I'm unsure
8 of -- And this would be a better question for our registration
9 manager, Betty Edwards -- in that there is an address crossed
10 off and one that is not crossed off, both being the same, it
11 looks -- appears to be the same address. I don't know if, in
12 this situation, if the verification operator would take the
13 address that is presented and see is that the person's current
14 registered address and, if so, does that match the ballot that
15 was issued to the person. And if the ballot was issued to the
16 person, then, more than likely, I would think that they would
17 validate that.

18 Q. Let me stop you there. In fact, if Ms. Edwards did
19 testify that staff is trained to look up the current
20 information, whether or not there is something crossed out,
21 would you have any reason to disagree with that?

22 A. I would not disagree. I think that was what I was
23 trying to express.

24 Q. Okay. And this is a ballot where someone was -- where a
25 staff person was able to determine what the precinct, correct

1 precinct, is. Isn't that true?

2 A. Well, I would think, from the information provided, they
3 would be able to tell you what the precinct is for 590 Helper
4 Drive in Bedford, Ohio.

5 Q. Okay. And, if you look at the top of the ballot, you
6 see that there is actually a precinct noted there, correct?

7 A. Correct, Bedford 2A.

8 Q. Okay. So, even though the address was crossed off,
9 someone was actually able to determine the correct precinct,
10 correct?

11 MR. KELLER: Objection. Speculation.

12 THE COURT: Overruled.

13 You may answer if you know.

14 THE WITNESS: I believe from the -- with the
15 crossed-off and the uncrossed-off address being the same, that
16 that's -- they were able to determine that.

17 BY MS. GUPTA:

18 Q. Okay. And if Ms. Edwards testified that this ballot was
19 rejected, would you have any reason to disagree with that?

20 A. I would -- I would engage in a conversation to get the
21 reasons for her, her action, whether rejected or accepted.

22 Q. Okay.

23 MS. GUPTA: Your Honor, plaintiffs and defendants have
24 entered into a stipulation regarding a range of voter files --
25 of documents, which includes 2651 to 3027, subject to a few

1 ballots in between --

2 THE COURT: 3027?

3 MS. GUPTA: Correct.

4 THE COURT: Okay.

5 MS. GUPTA: -- subject to a potential exception
6 regarding ballots -- documents that are screen-shots. And I'm
7 going to cover a couple of those; but I wanted to make sure
8 that, while I have this document, this ballot, up, that we
9 covered that range.

10 THE COURT: Okay. All right.

11 Mr. Keller, you agree that you have stipulated to
12 Documents 2651 through 3027?

13 MR. KELLER: That is correct, Your Honor. Obviously,
14 we want to see the documents. This is where the confusion is
15 coming in.

16 THE COURT: Right.

17 MR. KELLER: But, yes, subject to -- and it's just a
18 minor foundational issue with a few documents.

19 THE COURT: All right. Thank you.

20 Please continue, Ms. Gupta.

21 BY MS. GUPTA:

22 Q. Mr. Perlatti, I'm going to show you what's been marked
23 as Plaintiffs' Exhibit 2767. It corresponds with Cuyahoga
24 Bates Number 657.

25 Now, Mr. Perlatti, if you would take a look at the

1 current address field here, you see that the voter left off a
2 street number, correct?

3 A. Yes.

4 Q. And if you look at the very top of this ballot, there is
5 a precinct noted there, correct?

6 A. Yes.

7 Q. And their staff was able to determine the correct
8 precinct despite the fact that the voter did not put in their
9 street number, correct?

10 A. Yes.

11 Q. And they can do this by going into the database and
12 finding the voter using the other information provided,
13 correct?

14 A. Correct.

15 Q. Okay. I'm going to show you what has been marked as
16 Plaintiffs' Exhibit 2775, which corresponds to Cuyahoga Bates
17 Number 662.

18 Now, in this -- Again, if you look at the current
19 address field, Mr. Perlatti, you see that this voter left off
20 their city and zip code, but they do have a street address,
21 correct?

22 A. That is correct.

23 Q. And do you know whether this ballot would be rejected on
24 that basis?

25 A. Yes.

1 Q. And if you look at the very top of this ballot, you see
2 that there's a precinct noted there, right?

3 A. Correct.

4 Q. And so staff was able to determine what the correct
5 precinct was despite not having a city, village, or a zip code,
6 correct?

7 A. Correct.

8 Q. And, in fact, they can verify the identity of this voter
9 with the other information provided; isn't that true?

10 A. Yes.

11 Q. And -- I'm sorry. I'm going to go back to 2767 for a
12 moment. This, again, was Cuyahoga 657.

13 I don't believe I asked, regarding this, whether the
14 lack of a street number here would require rejection of this
15 ballot.

16 A. It would be rejected for lack of the house number,
17 street number.

18 Q. Okay. And this is true even though you can verify the
19 identity of this voter based on the other information provided;
20 isn't that true?

21 A. Correct. It's -- It's considered an incomplete address
22 under the current provisional criteria.

23 Q. Okay. I'm going to show you what's been marked as
24 Plaintiffs' Exhibit 2774. Corresponds to Cuyahoga 835.

25 Mr. Perlatti, if you look at the current address field

1 on this form, you see that the voter wrote in a street number
2 and a street address, but they wrote it in the City/Village
3 field, correct?

4 A. Correct.

5 Q. And if you look down at the former address field, the
6 information is also there. Do you see that?

7 A. Yes.

8 Q. And this -- this ballot would be thrown out, wouldn't
9 it?

10 A. Again, in this scenario, I would defer to the
11 registration manager because the street address and the current
12 Ohio address field matches the street address in the address
13 that's provided below. And, so, if this was the
14 person's -- again, if the precinct ballot matched that
15 address, I'm not sure if that would be rejected or approved.

16 Q. Okay. And if Ms. Edwards, the registration manager, did
17 testify that this was thrown out, this would be thrown out, you
18 wouldn't have any reason to disagree with that?

19 MR. KELLER: Objection, Your Honor.

20 Could I have a side-bar, please?

21 THE COURT: Yes.

22 (Thereupon, the following proceeding was held at side-bar.)

23 MR. KELLER: Your Honor, I want to make a continuing
24 objection to this line of her testifying to somebody else's
25 testimony with the witness. He just said what he knew about

1 the ballot.

2 THE COURT: Read the question back.

3 (The last question was read by the court reporter.)

4 THE COURT: Do you expect Ms. Edwards to be called?

5 MS. GUPTA: So, one of our intentions was to try to
6 complete the Cuyahoga material through Mr. Perlatti and thereby
7 avoid the need to bring in Ms. Edwards. And, in addition, we
8 have designated portions of Ms. Edwards' deposition, some of
9 which has been agreed to by defense, but we haven't agreed on
10 all of it.

11 MR. KELLER: That is my point. We entered into
12 designations on the depositions we're stipulating to the
13 admissibility of. These documents speak for themselves. If he
14 doesn't personally know, he shouldn't be -- he shouldn't be
15 doing it through somebody else's testimony.

16 THE COURT: Yes. I understand. Here is the dilemma.
17 They work together, correct?

18 MS. GUPTA: They do.

19 THE COURT: And what is Ms. Edward's official
20 position, again?

21 MS. GUPTA: Registration manager.

22 THE COURT: So she is the registration manager. And
23 she sort of reports to him?

24 MS. GUPTA: I believe she reports to Brent Lawler,
25 who then reports to Mr. Perlatti. And he testified that he

1 would defer to her.

2 THE COURT: All right. I want you to phrase your
3 question differently, because you can ask of him the same
4 proposition; and then, if he agrees, then you don't have this
5 situation where you're trying to get validation. I'm not
6 certain that it's entirely improper for her to secure
7 validation of what someone in his office does to determine
8 whether -- I mean, one of the claims.

9 One of the problems -- One of the issues that they
10 raised is whether these laws and rules, procedures, have been
11 applied uniformly by the various boards of elections. I think
12 the plaintiffs are entitled to adduce evidence to buttress that
13 aspect of their case. In doing so, I understand how they would
14 want to establish what the procedures are within an office,
15 such as within the Cuyahoga County Board of Elections. And I
16 see this as part of that.

17 Having said this, Ms. Gupta, I think Mr. Keller has a
18 valid point. So, you can't get into all of Ms. Edward's
19 testimony by asking that same question to Mr. Perlatti and then
20 having him validate it.

21 So, what I would ask is, just ask, you know, state the
22 proposition or ask him if, you know, the proposition is
23 supportable or that's how they do certain things in the
24 Cuyahoga County office. And then the Court can see,
25 independently from Ms. Edwards' testimony, whether she confirms

1 it.

2 MS. GUPTA: Thank you.

3 MR. KELLER: Thank you.

4 (The following proceedings were had in open court.)

5 THE COURT: Ms. Gupta, rephrase your question. And
6 please continue.

7 MS. GUPTA: Thank you, Your Honor. I'm actually
8 prepared to move on from that --

9 THE COURT: All right.

10 MS. GUPTA: -- document.

11 Just a moment, Your Honor. I appear to be missing a
12 document.

13 THE COURT: All right.

14 BY MS. GUPTA:

15 Q. Okay. I'm going to show you Plaintiffs' Exhibit 2839,
16 which corresponds to Cuyahoga Bates Number 713.

17 Mr. Perlatti, earlier we talked about the date-of-birth
18 requirement, correct?

19 A. Yes, we did.

20 Q. And I believe you testified that the Board will reject
21 ballots, across the board, if there is a missing date of birth,
22 true?

23 A. True.

24 Q. Now, on this ballot that you have up on your screen, you
25 would be able to verify the identity of this voter even though

1 there is no date of birth, correct?

2 A. Yes.

3 Q. I'll move on to --

4 MS. GUPTA: Ms. Clark, would you switch the screen,
5 please?

6 BY MS. GUPTA:

7 Q. We're pulling up here, Mr. Perlatti, Plaintiffs' Exhibit
8 2846, which corresponds to Cuyahoga 1027. Are you able to see
9 this document without the window in front of it?

10 A. I can see the first three fields.

11 Q. Okay. Actually, this question -- the question I have is
12 about -- is about the top of the ballot. So -- There we go.

13 So, looking at the date-of-birth field on this ballot, I
14 believe you testified that -- Whoops!

15 Okay. We're looking more closely at the date-of-birth
16 field on this. And, as I understand your testimony, the Board
17 will not reject ballots that have a mismatch of a date of
18 birth, correct?

19 A. If there is a mismatch of date of birth, again, if the
20 other four required fields are complete and correct, we will
21 present that to the Board for their approval or validation of
22 the provisional envelope.

23 Q. Now, this -- in this example before you -- Let me go
24 back for a second. Excuse me.

25 In the last two election cycles, the Board did not throw

1 out any ballots based on a mismatch of date of birth, did it?

2 A. Can you define "election cycle"?

3 Q. Excuse me. General election of 2014 and general
4 election of 2015.

5 A. I do not recall a provisional being rejected for a
6 mismatch, because I believe the other criteria were met, and
7 the Board approved to go ahead and accept the provisional
8 envelopes, or provisional ballots.

9 Q. So, the form that's in front of us, would this have been
10 rejected for a missing date of birth?

11 A. I do not know what staff did on that, but it looks like
12 a date of birth is presented in the field, not just -- not
13 necessarily in the boxes to the right. So I -- My opinion is,
14 I think that could be -- if that birthdate was correct, that
15 could be a valid envelope.

16 Q. Okay. And, this particular ballot, you don't know -- do
17 you know whether it was accepted or rejected?

18 A. That, I do not know.

19 Q. Okay. Moving on to -- And, Mr. Perlatti, would
20 Ms. Edwards, the registration manager, be in the best position
21 to answer that question?

22 A. She may recall --

23 MR. KELLER: Objection, Your Honor. Vague.

24 THE COURT: Rephrase your question, Ms. Gupta. I'm
25 going to sustain it.

1 MR. KELLER: Thank you.

2 MS. GUPTA: I'm going to withdraw the question.

3 THE COURT: All right.

4 MS. GUPTA: Okay.

5 BY MS. GUPTA:

6 Q. I'm going to show you, Mr. Perlatti, Plaintiffs' Exhibit
7 2866, which corresponds with Cuyahoga 1134, and I'm going to be
8 asking you some questions about the identification requirement.

9 If you can -- The parts that would need to be focused
10 are the identification part and then -- Excuse me. I'm sorry.
11 The document that I -- I'm sorry -- that I was interested in
12 was 2886. If I said "2866," I misspoke.

13 Thank you.

14 Actually, I found my copy, and it might be a little bit
15 easier to read.

16 Okay. So, starting over with this exhibit, it's
17 Plaintiffs' Exhibit 2886, and it's Bates stamped Cuyahoga 1110.

18 MR. KELLER: Your Honor, may I have a second? We're
19 just confirming.

20 THE COURT: Yes.

21 (Whereupon, there was a brief interruption.)

22 MR. KELLER: Thank you, Your Honor. Oh! I'm sorry,
23 Your Honor. I don't think we have this one.

24 THE COURT: All right. Would you -- Ms. Gupta, would
25 you give him a moment to at least look at this document?

1 MS. GUPTA: Certainly.

2 (Whereupon, there was a brief interruption.)

3 THE COURT: Does this document -- Does this exhibit
4 consist of only one page, Ms. Gupta?

5 MS. GUPTA: It does.

6 THE COURT: All right.

7 Do you need to see the original, or is that that you see
8 on the screen sufficient? In other words, do you need to see
9 the paper?

10 MR. KELLER: I can go off the screen, Your Honor.

11 THE COURT: All right.

12 MS. GUPTA: May I proceed, or do you want me to wait?
13 I can wait.

14 THE COURT: Well, Mr. Keller, are you done reviewing
15 the document? Or, if you haven't, would you let the Court know
16 when you have?

17 MR. KELLER: Yes, Your Honor. I'm okay. We can keep
18 going.

19 THE COURT: All right.

20 Ms. Gupta, please proceed.

21 MS. GUPTA: Okay.

22 BY MS. GUPTA:

23 Q. Mr. Perlatti, looking at this document, I'm going to
24 point you to the bottom of the ballot. Below the voter's
25 signature and date, do you see there it says: "07 --

1 non-matching SSN#"?

2 A. Yes.

3 Q. And if this document was produced in response to a
4 request for documents relating to rejection of ballots on the
5 basis of identification, would you have any reason to disagree
6 that this ballot was included in that?

7 A. No. If it was presented as a missing, or a mismatch, of
8 Social Security number, then, without actually looking at the
9 database myself, I am assuming, then, that that Social Security
10 number is incorrect.

11 Q. And, then, that -- would you also agree that, if it
12 were -- if this document was produced in response to a request
13 for ballots rejected on the basis of an ID mismatch, that this
14 ballot, then, was rejected on that basis?

15 A. Yes.

16 Q. Okay. Thanks.

17 Now, would this ballot, then, have been thrown out
18 because of the -- I believe you just testified that it would
19 be -- It was -- It would be thrown out on the basis of a
20 mismatching Social Security number?

21 MR. KELLER: Objection. Mischaracterization.

22 THE COURT: Overruled.

23 MR. KELLER: Thank you, Your Honor.

24 THE WITNESS: Yes. If staff determined that was the
25 incorrect Social Security number, then it would be rejected for

1 that.

2 BY MS. GUPTA:

3 Q. Okay. Now, if you look down a little farther on this
4 ballot, you'll see that the voter also checked the box relating
5 to -- indicating that the voter showed their photo
6 identification, correct?

7 A. Yes, that box is checked.

8 Q. So this ballot would be thrown out on the basis of a
9 mismatching identification despite the fact that the -- oh,
10 excuse me. Let me back up one second.

11 Showing a valid form of identification satisfies the ID
12 requirement; does it not?

13 A. I'm not as familiar with that part of the ID regarding a
14 provisional ballot.

15 Q. Well, let's look at the instructions on the left-hand
16 side of the form. Under "Identification," you see where it
17 says "Do ONE of the following"?

18 A. Correct.

19 Q. And the third bullet point there -- Well, I can read
20 these out. You can either write your full Ohio driver's
21 license or a state ID card number or write the last four digits
22 of your Social Security number, or check the box next to the
23 form of identification you showed to the precinct election
24 official, correct?

25 A. Yes.

1 Q. Okay. So, would you agree that, then, showing
2 the -- showing one's ID, photo ID, is sufficient to meet the
3 identification requirement on this form?

4 A. That is one of the acceptable forms listed.

5 Q. Okay. And the fact that the individual checked off the
6 box indicating that they showed that ID meets that requirement,
7 correct?

8 A. The box is checked. So, looks like that requirement was
9 met.

10 Q. Okay. So, now, this ballot, however, was thrown out on
11 the basis of a mismatch of ID despite the fact that the
12 individual met the ID requirement by showing their ID, correct?

13 MR. KELLER: Objection, Your Honor. Asked and
14 answered.

15 THE COURT: Sustained.

16 MS. GUPTA: Okay.

17 MR. KELLER: Thank you, Your Honor.

18 BY MS. GUPTA:

19 Q. Do you agree that this -- Withdrawn.

20 I'm going to show you what's been marked as Plaintiffs'
21 Exhibit 2856. It's also Bates Number Cuyahoga 1131.

22 MR. KELLER: Your Honor, can I have a moment? I don't
23 think we have this one, as well.

24 THE COURT: All right.

25 (Whereupon, there was a brief interruption.)

1 MR. KELLER: Sandhya, is this one on your exhibit
2 list? Is this on your exhibit list?

3 MS. GUPTA: Which Bates number is it? It's 2856.

4 MR. KELLER: Did you have an update to your exhibit
5 list yesterday?

6 (Counsel confer off the record.)

7 MR. KELLER: Thank you, Your Honor.

8 THE COURT: All right.

9 Please continue, Ms. Gupta.

10 MS. GUPTA: Okay.

11 BY MS. GUPTA:

12 Q. Mr. Perlatti, looking at this document, if I were to
13 represent that this document was produced in response to a
14 request for documents -- in response to a request for ballots
15 thrown out because of an error in the ID, would you have any
16 reason to dispute that?

17 MR. KELLER: Objection, Your Honor. Speculation.
18 Form.

19 THE COURT: Overruled. Mr. Perlatti is in a position
20 he can answer it, if you know, Mr. Perlatti.

21 THE WITNESS: I just -- I see that there's the last
22 four of a Social provided. I don't know if that's the correct
23 Social, or not, for the individual. If it was provided as a
24 mismatch of information, then I can make an assumption that the
25 Social Security number is incorrect and that's why it was

1 rejected.

2 BY MS. GUPTA:

3 Q. This, too, is a document where the voter checked off the
4 box indicating that she showed a photo ID, correct?

5 A. Yes, that box is checked.

6 Q. Okay. And there appears, also, to be -- Let me back up
7 for a moment.

8 So, again, as with the last ballot form we just looked
9 at, the ballot would have been thrown out on the basis of an ID
10 mismatch despite the fact that the photo identification box is
11 checked, correct?

12 A. Yes.

13 Q. And, in this example, the voter also put in a number in
14 the driver's license field, correct?

15 A. Yes.

16 Q. Are you able to tell whether that driver's license is in
17 the correct form or not?

18 A. It doesn't look like it's the driver's license number
19 that was put there. There's two numbers, a lot of times, on a
20 driver's license: Your actual license number that begins with
21 an alpha character, and then I believe there is a picture (sic)
22 that is close to the picture and -- which is not the actual
23 driver's license number. Sometimes individuals will put that
24 on a registration card or provisional envelope. And that's
25 not -- that's not their correct number.

1 Q. If a voter puts both a driver's license number and a
2 Social Security number and one of them is incorrect, would you
3 reject that ballot?

4 A. I believe, if one of the two was correct, that they
5 would accept that ballot.

6 Q. Okay. But the same is not true if you have someone who
7 checked off the box and put in a mismatching Social?

8 A. That -- I don't believe that has been the practice in
9 Cuyahoga.

10 Q. And, just to clarify, you don't believe what is the
11 practice?

12 A. If there -- If the driver's license or Social Security
13 number does not match the registration database and the box is
14 checked, the one that we're talking about as far as photo
15 identification being shown to the precinct election official, I
16 don't think we approve that ballot in Cuyahoga.

17 Q. Let me ask you some questions about the absentee
18 procedure. Unlike provisional voters, absentee voters do get
19 an opportunity to cure errors, correct?

20 A. On their -- Yes, on their ballot identification
21 envelope.

22 Q. Thank you for clarifying. Yes. And that's through the
23 Form 11-S, correct?

24 A. Correct.

25 Q. Okay. Now, you're not permitted to contact absentee

1 voters in any other way besides the Form 11-S; is that true?

2 A. That's correct. That's my understanding.

3 Q. Sometimes, you do have the phone number, an e-mail
4 address -- even sometimes an e-mail address for absentee
5 voters, correct?

6 A. That is correct.

7 Q. And you could actually do phone calls through robocalls;
8 could you not?

9 A. We could. If the information -- If we loaded the
10 information into our system, we could.

11 Q. But you're not permitted to do that?

12 A. That's correct.

13 Q. And there's no record of whether an 11-S form was
14 actually sent to a voter, is there?

15 A. I do not believe that we keep a copy of the 11-S form
16 that's sent to a specific individual. The procedure is, when
17 we challenge someone, then the next step in the process is, you
18 go ahead and you put an 11-S form out. Typically, we get it
19 out in the same day. Sometimes it's the next day. And it also
20 depends on the param- -- There's parameters set out in a
21 directive as to when you have to send them. We always comply
22 with that; but, more than likely, we do it the same day that we
23 execute the challenge.

24 Q. And I'm going to ask you a question about address, the
25 address requirement on an absentee ballot. You know, let me

1 back up for one second.

2 When you talked about the fields that are required on
3 the provisional ballot, as far as you know, the same
4 requirements are present on the absentee ballot as are on the
5 provisional, correct?

6 A. Right. The same five fields have to be present on the
7 identification envelope.

8 Q. And those five fields are the printed name, the ID, date
9 of birth, signature, and --

10 A. -- address.

11 Q. Thank you.

12 A. Yes.

13 Q. As to the address, actually, Cuyahoga County was
14 pre-printing addresses, correct, for some time?

15 A. Yeah. We have been pre-printing name and address on our
16 identification envelopes.

17 Q. And now you're not; is that true?

18 A. We still put that information on the envelope. It's the
19 manner in which we do that information. So, previously, on the
20 identification envelope, on the left half of the form, you
21 would have -- that's where you would have all the verbiage
22 requiring your name and address and your ID. And all that
23 would be on that side. And the right side of the envelope is a
24 spot where almost like a mailing address would be printed
25 there.

1 Previously, Cuyahoga, on the left-hand side, in the
2 printed name field and in the address field, we would have our
3 printer populate that information on that part of the form.
4 And, additionally, we would have it on the right side of the
5 envelope in the form of, like, a mailing address, with the name
6 and the street, street address, below that. So, we did both of
7 those previously.

8 In the last election, I think -- I believe it was just
9 starting with the last election -- we no longer put it on the
10 left-hand side of the envelope, but we maintained it on the
11 right-hand side. We stopped doing it on the left-hand side
12 because it was very difficult for the printer to, at a very
13 high percentage, consistently get that information to hit the
14 spot on the form, to get that variable data printed. And so
15 sometimes it would be halfway through, like, a line below the
16 line. And it just -- it didn't look correct. So, we stopped
17 that; but we kept it on the right-hand side of the envelope.
18 And per direction from the Secretary of State's Office, that
19 information appearing on the envelope, even when it's -- when
20 we have it on it, the right side of the form meets the
21 requirements of the Secretary of State to have that information
22 pre-populated on the form.

23 Q. So, just to be clear, if there was a mistake in how
24 someone wrote their address on that left-hand side, would that
25 be cause to reject the ballot?

1 A. No. I believe we would -- we would use the address that
2 we pre-printed on the envelope. And the ballot that we sent
3 them corresponds to that address that we pre-printed on the
4 envelope.

5 Q. Moving on to a question about identification matching.

6 THE COURT: Before you move on to another area, could
7 I see you and Mr. Keller right here?

8 (Thereupon, the Court and Counsel conferred out of the
9 hearing of the court reporter.)

10 THE COURT: Please continue, Ms. Gupta.

11 MS. GUPTA: Thank you, Your Honor.

12 BY MS. GUPTA:

13 Q. Mr. Perlatti, isn't it true that, before -- so, in the
14 process of reviewing absentee ballots, would you agree that the
15 Board's staff are trained to check the absentee application
16 that comes in, first, against the registration database before
17 sending out a ballot?

18 A. We instruct our employees to compare the vote-by-mail
19 application, or absentee application, to the database to see if
20 the information is correct.

21 Q. And then, at that point, you contact a voter if there is
22 some mismatch in the application, a mismatch with the
23 information in the registration database; is that correct?

24 A. We'll send a letter out to the individual. And,
25 depending on what part we are of the election cycle, basically,

1 focusing on the registration deadline, if it's pre-registration
2 deadline, we'll send out a letter, and we'll include a
3 registration card and an additional vote-by-mail application.
4 And, then, this way, if there is an issue with the
5 registration, they can complete a registration card, send that
6 in, and then send another vote-by-mail application with that.

7 And upon receiving that, if it's correct, we'll go ahead
8 and process. If it is after the close of registration, they're
9 not able to update the registration record. So, at that point,
10 we would send them a letter. I believe we still include the
11 registration card because, ultimately, we want to get the
12 registration correct when we are able to update it. But, in
13 that scenario, we would not send out another vote-by-mail
14 application because we're not able to adjust their record.

15 I think, also, in that letter, we may indicate to them
16 that, if there was a change, if there was a change of address,
17 that they could go to the polls and vote provisionally on
18 Election Day.

19 Q. Let me show you what's been marked as Plaintiffs'
20 Exhibit 2974. It corresponds to Cuyahoga 482 and 483.

21 That's 482. I'm actually going to try to put them side
22 by side, but I'm having a little difficulty.

23 Mr. Perlatti, if I were to represent to you that this
24 document was produced in response to a subpoena request for
25 documents -- for ballot forms rejected on the basis of a mis-

1 or, an incorrect ID, would you have any reason to dispute that?

2 A. No. If my staff provided it for that, then it's
3 probably correct.

4 Q. Okay. Are you able to tell -- Well, let me back up.

5 In this instance, you see that on the right-hand side is
6 the vote-by-mail ballot application, correct?

7 A. Correct.

8 Q. And on the left-hand side is the ID envelope?

9 A. Yes.

10 Q. Okay. And the last four digits of the Social Security
11 number actually match in both cases, correct?

12 A. Yes, they do.

13 Q. Are you able to tell from this why this would have been
14 rejected?

15 A. The only thing I can think of is that the -- and I don't
16 know this without looking at the registration database, but the
17 registration database may have a different last four Social
18 Security number for this individual. And, so, if that were to
19 be true, then the application was incorrectly processed and the
20 ballot sent out.

21 There is, I believe, a higher level of scrutiny, or, in
22 Cuyahoga County, there is a higher level of scrutiny on the
23 returned ballots that come back, versus the application. It
24 doesn't justify sending out, if that was wrong, sending it out
25 in the first place; but that -- and I don't know if that is the

1 case; but that, potentially, could be the scenario here.

2 This is not an excuse, but the reality is that you bring
3 on a lot of temporary employees and other staff; and they may
4 have -- they may have gotten that one wrong.

5 Q. Sure.

6 A. Now, but, also, an 11-S form would be sent out to the
7 individual to try to cure that ballot.

8 Q. I'm going to show you what's been marked as Plaintiffs'
9 Exhibit 2988. It's corresponds to Cuyahoga 476 and 477. And,
10 primarily, I'd like you to look at 477.

11 A. Which one is 477?

12 Q. That's this document, the one with the screen-shot.

13 A. Okay. Thank you.

14 Q. Mr. Perlatti, if I were to represent to you that this
15 ballot was, or -- excuse me -- this document was produced in
16 response to plaintiffs' request for documents that show the
17 identification envelope and what that was compared to, would
18 you have any reason to dispute that?

19 A. Well, obviously, this document we're looking at is not
20 an application. This looks to be a screen-shot of our voter
21 registration database, in which information is inputted from an
22 application. Staff -- I mean, I believe the staff provided you
23 this screen-shot probably because they may have had
24 difficulties in trying to find the application because of the
25 volume of them. But that's -- that is a -- that's -- I don't

1 know if our DIMS registration database -- It looks like it's
2 out of the absentee module.

3 Q. Okay. And if you can look at the field -- it states
4 "Election" and "11-4, 2014." Are you able to verify that this
5 is a screen-shot that would have correlated to what a staff
6 member would have seen at the time they were making the
7 comparison between the ID envelope and the information in the
8 database?

9 A. Yes.

10 Q. Okay. And I'm going to show you Plaintiffs' Exhibit
11 2984, which corresponds to Cuyahoga 544 to 545. And, in
12 particular, I'm going to direct your attention to the Bates
13 stamp number 545. Do you see that as a screen-shot as well?

14 A. Yes.

15 Q. And, with this document, it says -- With the last, if I
16 were to represent that this document was produced in response
17 to a request for documents showing what the ID envelope was
18 compared to, would you have any reason to dispute that?

19 A. No. This information would be inputted from the
20 application.

21 Q. Okay. And would you be able to verify that this
22 screen-shot of the database corresponds to what a staff member
23 would have seen, what the screen would have looked like, what
24 the staff member would have seen when they did the actual
25 comparison to the ID envelope at the time, at the time of the

1 election?

2 A. This would -- This would be the screen.

3 Q. Thank you.

4 MS. GUPTA: Your Honor, could we have a side-bar, if
5 you want? Or do you want --

6 MR. KELLER: If we could just have a moment to confer,
7 Your Honor?

8 THE COURT: Yes. Yes, you may.

9 (Whereupon, Counsel confer off the record.)

10 MR. KELLER: Your Honor, can I have a side-bar,
11 please?

12 THE COURT: Yes.

13 (Thereupon, the following proceeding was held at side-bar.)

14 MR. KELLER: What we're trying to clarify is, I want
15 to record to be clear on which information is present at the
16 time they're processing the ballot. I assume, based on the
17 questions we've heard so far, that at the top is -- I'm not
18 sure if this is or is not. I guess I can --

19 THE COURT: Can you establish that, Ms. Gupta, with
20 this witness?

21 MS. GUPTA: Let me make sure I understand what you're
22 asking.

23 MR. KELLER: These top fields, would that stay static?
24 Or is that based on the most recent information they have? I
25 just want to make sure we know what the information comes from

1 and what time it's reflective of.

2 MS. GUPTA: I see. Do you want to ask it on cross, or
3 would you prefer that I do it?

4 THE COURT: If you want to get this document in --

5 MS. GUPTA: Okay. I'll handle it.

6 THE COURT: -- then you need to --

7 MS. GUPTA: I'll be happy to.

8 THE COURT: I think that would be a part of the
9 foundation.

10 MS. GUPTA: Okay. Sure. So, it's a matter of asking
11 about the information above?

12 MR. KELLER: Yeah. How I interpreted his answer is
13 that, the bottom, with the poll fields, that's there at the
14 time of the comparison of the ballot. But I just want to make
15 sure the record is clear on whether it is or not. I don't know
16 the answer.

17 MS. GUPTA: All right.

18 THE COURT: Just clarify that.

19 MS. GUPTA: Okay. Thank you, Your Honor.

20 THE COURT: All right.

21 (The following proceedings were had in open court.)

22 BY MS. GUPTA:

23 Q. Mr. Perlatti, drawing your attention back to Cuyahoga
24 545, this is the screen-shot that we were just looking at. And
25 could you actually just clarify that, when you testified that

1 this is the screen-shot that a staff member would have been
2 looking at at the time they were making the comparison between
3 the ID envelope and the database, that the information -- that
4 all of the information as presented here would have been what
5 that staff member saw, including the information where at the
6 top of the form it states voter's name and address on file?

7 A. You see the name, the address, the ID, the date of
8 birth, and the signature, a picture of the signature that we
9 have on file in the registration database.

10 Q. And that's at the time they're reviewing the document,
11 or -- excuse me -- the ID envelope?

12 A. Yes.

13 Q. And it's not -- that information and the voter's name
14 and address on file would not be updated, which is to say that,
15 if this were printed, let's say in the last couple of months,
16 would this screen-shot possibly show an updated address for the
17 voter?

18 A. That's an IT question for the IT department. So, as far
19 as is this module -- I believe, when they're viewing this,
20 they're viewing this -- it should be -- it pulls from the main
21 registration database. So, all of this is done in the
22 registration database, which is made up of different modules.
23 So, there's a -- there's a provisional module. There's an
24 absentee module. You have the main database, which has
25 their -- really, their registration record. So, it's all

1 feeding from that one area.

2 And, so, this should update in live time. It should
3 have their current information. But then, once the close of
4 registration happens, it's locked down because you can't make
5 any adjustments to the database at that point in time because
6 registration has closed as far as updating -- well, anything
7 you would update via a registration card.

8 So, that's what -- So, again, once the close of
9 registration comes, the database is locked down. And that's
10 what it looks like for that election cycle. And then, once you
11 certify the election, the database is opened back up again; and
12 any updates that need to happen occur.

13 Q. Okay. Just a moment.

14 (Thereupon, Counsel confer off the record.)

15 MS. GUPTA: So, Your Honor, we would move into -- It
16 looks like there may still be some question about the documents
17 showing a screen-shot. And I believe we can sort it out
18 separately. But I guess what I would like to do is to move
19 these exhibits -- The specific screen-shot documents that Mr.
20 Keller has identified, I can read them off, move them into
21 evidence, and we can make a record.

22 THE COURT: Do you move this 00545 into evidence?

23 MS. GUPTA: Right. Actually, it's connected to -- I
24 believe this one was connected to 2984, P2984.

25 THE COURT: Okay. Do you have an objection to P2984,

1 Mr. Keller?

2 MR. KELLER: Your Honor, we do at this time, based on
3 relevance, potential 403 confusion issues. I don't want to
4 keep --

5 THE COURT: The Court is not confused. And, as the
6 finder of fact, I think that your objection probably goes more
7 to weight, and not to admissibility. Mr. Perlatti has
8 identified the document.

9 You know what the document is. Am I correct, Mr.
10 Perlatti?

11 THE WITNESS: On the screen-shot?

12 THE COURT: Yes.

13 THE WITNESS: Yes.

14 THE COURT: All right. And is this a document that
15 you typically deal with in your capacity as Deputy Director of
16 the Cuyahoga County Board of Elections?

17 THE WITNESS: Yes.

18 THE COURT: I'm going to admit it. And you certainly
19 have an opportunity to cross-examine on that document, which
20 would more frame the weight the Court will attribute to the
21 exhibit, as opposed to whether the exhibit is admissible. The
22 exhibit certainly will come in as an 803.6 exhibit. And so I'm
23 going to allow it. I've already determined that those
24 documents are relevant previously. And so your objection is
25 well taken, but overruled.

1 Please continue, Ms. Gupta.

2 MS. GUPTA: Your Honor, just a question. There are
3 other screen-shot documents like that.

4 THE COURT: Do you have the same objection to those
5 screen-shot documents; or was your objection, Mr. Keller,
6 limited to the one that we saw on 00545?

7 MR. KELLER: It's the same objection. I just want to
8 preserve it, but I understand the Court's ruling.

9 THE COURT: All right. So, with that understanding,
10 have you and Ms. Gupta conferred on the remaining screen-shot
11 documents?

12 MR. KELLER: It's the same issue as to all those
13 screen-shot documents.

14 THE COURT: Yeah. But my question is, have you seen
15 the other screen-shot documents. And your objection is as to
16 relevancy; is that right?

17 MR. KELLER: And 403, Your Honor.

18 THE COURT: And maybe -- Do you want to state for the
19 record what you believe is the confusing part that you believe
20 would also confuse the Court?

21 MR. KELLER: I will say I'm confused at this point. I
22 don't know whether that information is at the time they printed
23 it or at the time that the voter was evaluated for whether they
24 had mismatching information.

25 THE COURT: And you don't know the answer to that, Mr.

1 Perlatti?

2 THE WITNESS: No. And that's where, with the IT, I
3 don't know, when they printed this, if that absentee module is
4 kind of like locked down for that election or, once we're up
5 and updating again, if this has been updated. That, I
6 can't -- I don't know, because when -- When I'm viewing it at
7 that point in time in the election process, I know that that
8 information is good at that point in time, but I --

9 THE COURT: And what you can do, Mr. Keller, is
10 explore that on cross-examination. As I said, that will inform
11 the weight that the Court gives to that document and others
12 related to that document, the screen-shots. But my point is
13 that these are documents that are kept and maintained in the
14 regular and ordinary course of his business. And he's
15 testified to that. And he's identified at least this specific
16 document.

17 And, presumably, if you all stipulate to it or if Mr.
18 Perlatti can so inform the Court, all the documents in this
19 category are the same. And so they would be business records,
20 and they would be admissible. But you may be able to establish
21 that the Court shouldn't give weight to those documents because
22 they don't inform any of the Court's decisions on the issues
23 pending before the Court.

24 Does that clarify it for you?

25 MR. KELLER: I understand the Court's ruling, yes.

1 THE COURT: Okay. All right.

2 MS. GUPTA: Your Honor, then, would you like me to
3 read off the exhibits that have those screen-shots?

4 THE COURT: Exactly.

5 MS. GUPTA: Okay. So plaintiffs will move into
6 evidence Plaintiffs' Exhibit 2988, 2984, which is the one we
7 were just discussing, 2660, 2663, 2668, 2675, 2677, 2687.

8 THE COURT: Mr. Keller?

9 MR. KELLER: Your Honor, it's the -- The only other
10 point beyond the objection is that I cannot tell, without the
11 Bates numbers, whether we even have gotten this.

12 THE COURT: All right. Here is what we're going to
13 do: With the exception of 2984, which I've just admitted, I'm
14 going to hold in abeyance my admission until after lunch. And
15 during the lunch break, Mr. Keller, I want you to get together
16 with Ms. Gupta and harmonize these numbers with the Bates
17 numbers that you already have.

18 It's already been established as a matter of record that
19 you have these documents. It's just that there is a disconnect
20 between the Bates numbers and the exhibit numbers, from what
21 I'm given to understand. Is that correct?

22 MR. KELLER: That is not correct, Your Honor.

23 THE COURT: All right.

24 MR. KELLER: My understanding is that, some documents,
25 we did not have. I'm, obviously, kind of working on the fly

1 here, but based on my understanding --

2 THE COURT: Okay. So we'll determine, after lunch,
3 which documents you have, which ones you don't have. The ones
4 you don't have, you should be provided over the lunch break so
5 that you can look at them. And, at that time, I will rule on
6 their admissibility. But I will tell you that the likelihood
7 is I will find them admissible on the same basis as 2984,
8 although I will give some consideration to your argument as to
9 you are not being provided with these documents in advance of
10 trial, which may be a separate basis to exclude them. But
11 that's more a discovery issue than an evidentiary issue, but
12 I'll have to wait until you get a chance to compare.

13 I might be mistaken, but my anticipation was that you
14 and Ms. Gupta would have resolved all of these issues before
15 Mr. Perlatti took the stand, because I had directed counsel,
16 yesterday, to get these document issues resolved so that we
17 would be able to take up time with testimonial evidence, as
18 opposed to arguments about which documents correspond to which
19 numbers.

20 Did you all not get a chance to do that this morning as
21 I directed?

22 MS. GUPTA: Your Honor, we did. We did as to the
23 majority of the documents. And those screen-shots were the
24 exception that we determined we would ask foundational
25 questions about. And I don't think we were aware that the

1 defendants did not have the other set of documents.

2 THE COURT: Okay. All right.

3 MS. GUPTA: I apologize.

4 THE COURT: Who has the witness after Mr. Perlatti?

5 MR. McTIGUE: I do, Your Honor.

6 THE COURT: Please stand, Mr. McTigue. And who is
7 that witness?

8 MR. McTIGUE: Mr. Tim Burke.

9 THE COURT: And who is Mr. Burke?

10 MR. McTIGUE: He is on the Board of Elections for
11 Hamilton County.

12 THE COURT: All right. Do we have the same -- Who
13 has -- Ms. Conover?

14 MR. CONOVER: Yes.

15 THE COURT: Do we have the same kind of issues that we
16 have here with Mr. Perlatti?

17 MR. CONOVER: So, last evening, Mr. McTigue
18 represented that Mr. Burke would only be testifying about the
19 legislative intent in his testimony in front of the General
20 Assembly. And this morning we heard that there may be
21 documents now involved that he would be authenticating. So,
22 we're not prepared for that this morning.

23 THE COURT: All right. The documents that you're
24 going to review, Mr. McTigue, are you certain that those
25 documents have already been produced to the defense?

1 MR. McTIGUE: Yes. Yes, Your Honor.

2 THE COURT: All right. So I want the two of you, over
3 lunch, also, to get together. If there are documents that we
4 could stipulate to, stipulate to them. I don't want this same
5 type of back-and-forth over whether they have them, whether the
6 numbers correspond, because this takes up Mr. Perlatti's time.
7 He didn't ask to be here. The rest of us asked to be here.
8 And I take great exception to wasting Mr. Perlatti's time
9 because he has one election that is completed, but probably not
10 totally complete, and he has a big election coming up in
11 November that you might have heard of that he has to prepare
12 for.

13 So I'm going to -- Do you have any more before we break
14 for lunch?

15 MS. GUPTA: I have -- I do have just a little bit
16 more, Your Honor.

17 THE COURT: Okay. And I hope that the just a little
18 bit more is not this same we-don't-know-whether-we-have-these-
19 documents issues. Please tell me they're not.

20 MS. GUPTA: I don't believe we have additional issues
21 on that. In fact, plaintiffs and defendants were able to agree
22 on a slew of other exhibits, as well, which I was going to
23 mention at the end.

24 THE COURT: Okay. You have 15 minutes to conclude
25 your examination.

1 MS. GUPTA: Very well.

2 THE COURT: Have a seat, Mr. Keller.

3 MR. KELLER: Thank you, Your Honor.

4 BY MS. GUPTA:

5 Q. Mr. Perlatti, thank you.

6 Turning for a moment to early in-person voting, your
7 staff is present to ensure that voters know to fill everything
8 out; is that correct?

9 A. Well, when they come in-house, they meet with one of our
10 employees. In the application, once we have their address,
11 we'll print the application. They will look at it, fill in the
12 other information. And then we'll go ahead and get them the
13 ballot and give them the ballot and the identification
14 envelope. And then they will go into a voting booth and vote
15 that.

16 So, they do not turn the ballot back in to our staff
17 when they're done voting. We have a ballot box in the voting
18 room that, when they're done, they just submit it into that.

19 So, staff -- staff is there to assist them in, I guess
20 for the application process, in getting them -- so we can get
21 them the correct ballot. But then, once the ballot is issued
22 with the ID envelope, they are -- basically, they're on their
23 own, you know, in the room.

24 Q. But the staff does sometimes -- as they return that
25 ballot and ID envelope to the voter, there's nothing that

1 prevents them from saying to the voter, Make sure you fill out
2 everything correctly, that kind of thing? Would that be
3 correct?

4 A. That's correct. They probably, in fact, do direct them,
5 Please make sure you fill out the envelope completely.

6 Q. Okay. I would like to show you what's been marked as
7 Plaintiffs' Exhibit 3027. And it corresponds to Cuyahoga 1143
8 and 1144, but we're going to focus on the first page.

9 Mr. Perlatti, do you recognize this document?

10 A. I'm sure I've seen it before. And from the title on the
11 document --

12 MR. KELLER: Objection, Your Honor. I'm sorry, but we
13 haven't seen this.

14 MS. GENTRY: Your Honor, this was actually used at a
15 deposition. And I know it was produced. I have a copy right
16 here (indicating). It was Plaintiffs' Exhibit 38 at the
17 deposition in Cuyahoga County. I'm happy to provide it to
18 counsel right here.

19 MS. CARWILE: Your Honor, the problem, they submitted
20 their exhibit list. I've gone through it since all this issue
21 has come up. There's a number of these documents that are not
22 on their Exhibit B, or Appendix B to the joint pretrial, which
23 was their amended exhibit list.

24 THE COURT: All right.

25 MS. CARWILE: And so they're not in our documents that

1 they've provided to us as exhibits for this trial.

2 MS. GENTRY: Your Honor, that's simply not correct.

3 MS. CARWILE: Can you tell me, then, where it is,
4 because I just spent the last time looking for it?

5 MS. STOCK: I gave you a supplement of the Exhibit B.
6 And then I just gave you two notebooks of these documents that
7 we're just talking about. We just got them copied.

8 MS. CARWILE: The supplement yesterday is not the same
9 thing as getting this pre trial.

10 THE COURT: All right. All right. We're going to
11 continue with Mr. Perlatti's --

12 Ms. Carwile, have you ever heard the expression that, in
13 the battle of the elephants, only the grass gets hurt? You
14 ever heard that?

15 MS. CARWILE: No.

16 THE COURT: Would you know what it means?

17 MS. CARWILE: No.

18 THE COURT: That when the two sides are warring back
19 and forth, poor Mr. Perlatti, here, has to sit down and suffer
20 through it. And, if anyone was paying attention, I just said
21 that we don't want to further burden Mr. Perlatti.

22 Now, I'm going to allow him to testify about this
23 document. And we're going to sort this out after he gets off
24 the stand.

25 Ms. Gupta has about seven minutes to complete her

1 examination. And so she is going to complete her examination
2 with dispatch. And, if there are any more substantive
3 objections, I won't restrict you from making the objections.
4 And then we'll have an all-counsel meeting at the conclusion of
5 the direct, and we'll sort out this whole conundrum of the
6 exhibits. And this is inevitable in a case with this
7 many -- that's this paper intensive. So, the test will be
8 surprise and prejudice.

9 MS. CARWILE: Yes. Sorry, Your Honor. Thank you.

10 THE COURT: Nothing to apologize for.

11 Please continue.

12 BY MS. GUPTA:

13 Q. Mr. Perlatti, you were saying about this document --

14 A. Yes. So, this looks like a report that we would print.
15 And it looks like this indicates, for the certain types of
16 provisional categories, whether you count it valid or not, do
17 you update their record or not, and do you give them voter
18 history or not.

19 Q. Okay. And you see -- Right. So, you see the columns at
20 the top, including Count Ballot, Update Vote, Update Voting
21 History, or -- excuse me -- Update VH?

22 A. Yes.

23 Q. And "Update VH" stands for update voting history,
24 correct?

25 A. Voter history.

1 Q. And what does "Update Vote" refer to?

2 A. "Update Vote," I believe that is updating their voter
3 registration record.

4 Q. And what about updating VH?

5 A. That's giving them credit for voter activity in this
6 election, or in the election.

7 Q. Okay. Now, if you look at fields 3, 5, 6, 7, 8 and 11,
8 those correspond to missing address, missing date of birth,
9 non-matching date of birth, missing ID, non-matching ID, no
10 printed name, correct?

11 A. Yes.

12 Q. And for all of those I just read off, there is a "Y,"
13 i.e. the letter "Y," under "Update VH," true?

14 A. Yes.

15 Q. And that reflects the fact that a voter is given voting
16 history credit for -- excuse me -- they're given credit for
17 voting even though -- excuse me. Let me back up for a second.

18 For those same fields that I mentioned, under "Count
19 Ballot," there is an "N," a letter "N," for "No," true?

20 A. Correct, yes.

21 Q. And so the voter -- meaning that the voter is given
22 credit for voting for those fields that I mentioned even though
23 that voter's vote hasn't counted, correct?

24 A. Right. There is a record of voter activity in that
25 election, and their ballot did not count.

1 Q. And so the Board is able to verify the identity of the
2 individual even though there may have been an omission or a
3 mismatch of information, correct?

4 A. That is correct.

5 MS. GUPTA: I'd like to confer with Counsel, Your
6 Honor.

7 THE COURT: You may.

8 (Whereupon, there was a brief interruption.)

9 MS. GUPTA: Your Honor, there are no further
10 questions; but I want to put on the record the stipulation, on
11 the range of documents that we've come to, there might be a
12 couple documents in there that I would need the witness to
13 authenticate.

14 THE COURT: Okay. If you stipulated to them, why do
15 you need Mr. Perlatti to authenticate them?

16 MS. GUPTA: There was the range -- It's the range,
17 actually, between Plaintiffs' Exhibits 1041 to 1055.

18 THE COURT: Have you conferred with opposing Counsel
19 about this?

20 MS. GUPTA: We did, but there were a couple of
21 exceptions in that range.

22 THE COURT: All right. What were the two exceptions?

23 MR. KELLER: I'm sorry. I'm confused. We already
24 went over the screen-shot issue.

25 MR. PIERCE: Your Honor, we stipulated to admission of

1 portions of a deposition that was taken of one of Mr.
2 Perlatti's employees, the head of the registration department.

3 THE COURT: Yes.

4 MR. PIERCE: And Ms. Gupta wanted to introduce some
5 exhibits that were talked about at that deposition although
6 that deposition testimony did not sufficiently authenticate the
7 documents because that employee did not recognize them as
8 documents from her department.

9 THE COURT: All right.

10 MR. PIERCE: So, I mentioned to Ms. Gupta, if she
11 could lay the foundation with Mr. Perlatti as to those
12 documents' authenticity, then we could --

13 THE COURT: All right. That's fine. I just asked
14 which documents they were. How many documents are there?

15 MR. PIERCE: Just two, to my understanding, Your
16 Honor.

17 THE COURT: Does your case rise and fall on those two
18 documents?

19 MS. GUPTA: No, it does not.

20 THE COURT: What are these documents about?

21 MS. GUPTA: They were poll-worker training documents.
22 One was a training manual, I believe. I'm sorry. I just seem
23 to have misplaced the paper that indicated which exact ones
24 they were, but they were indicated in the deposition of
25 Ms. Edwards.

1 THE COURT: Ms. Pierce, do you know which ones they
2 are?

3 MR. PIERCE: Yes, Your Honor. I believe they're
4 10 --

5 THE COURT: I don't care who locates them for me.

6 MR. PIERCE: Yes, sir.

7 THE COURT: Just locate them, please.

8 MR. PIERCE: Yes, Your Honor.

9 Your Honor, I believe that P1050 is one of them. P1051
10 is the other. P1052.

11 I apologize, Your Honor. There were three.

12 THE COURT: All right. There are three.

13 Is there anyone who can put their fingers on P1050
14 through P1051?

15 MS. GUPTA: I believe Diane is doing that.

16 THE COURT: All right.

17 MS. GUPTA: Thank you. 1050, 1051, 1052. Thank you.

18 BY MS. GUPTA:

19 Q. Mr. Perlatti, just quickly, I'd like to show you what
20 has been marked as Plaintiffs' Exhibit 1050. And it is Bates
21 stamped "Cuyahoga 81." I'll put it this way (indicating). Do
22 you recognize this document?

23 THE COURT: Why don't you hand the document to him.
24 Let him thumb through it, because it's multiple pages. I'm
25 presuming that it's a document -- You can give it to him, Ms.

1 Gupta. It's a document that the defense has?

2 MR. PIERCE: It is, Your Honor.

3 THE COURT: So, it's a document that the defense has
4 seen?

5 MR. PIERCE: We have seen it, yes, Your Honor.

6 THE COURT: All right.

7 Mr. Perlatti, would you review that document and tell me
8 whether you're familiar with it, please?

9 MS. GUPTA: This document was produced by the Cuyahoga
10 Board of Elections in response to our subpoenas.

11 THE COURT: All right.

12 THE WITNESS: This document, this definitely is a
13 Board of Elections training document. And it looks like this
14 is a part -- that this is associated with our poll-worker
15 department as one of their training tools.

16 THE COURT: Are you familiar with it, Mr. Perlatti?

17 THE WITNESS: I have -- I have probably -- Well, I'm
18 familiar with the content inside. But to say this is
19 specifically a poll-worker training manual, that I
20 can't -- without seeing the title page, I can't say that's
21 exactly what it is. But all the content in here -- and
22 this -- This follows the form of our training manual. So my
23 best assumption is that's what it is.

24 MS. GUPTA: Your Honor, we would move Plaintiffs'
25 Exhibit 1050 into evidence.

1 THE COURT: Mr. Keller?

2 MR. KELLER: No objections, Your Honor.

3 THE COURT: 1050 will be received.

4 BY MS. GUPTA:

5 Q. Mr. Perlatti, I'm going to show you what has been marked
6 as Plaintiffs' Exhibit 1051. It corresponds to Cuyahoga 102 to
7 112.

8 MS. GUPTA: Your Honor, may I approach so that the
9 witness can review?

10 THE COURT: Yes.

11 THE WITNESS: This is a document produced by our
12 poll-worker department for provisional training.

13 THE COURT: Yes. What document number is that?

14 MS. GUPTA: That is 1051, Your Honor. And we would
15 move to admit it.

16 THE COURT: Any objection to 1051?

17 MR. KELLER: No, Your Honor.

18 THE COURT: 1051 will be received.

19 What's next?

20 BY MS. GUPTA:

21 Q. And, Mr. Perlatti, I'm going to show you what's been
22 marked as Plaintiffs' Exhibit 1052, which is Cuyahoga 113 to
23 122.

24 MS. GUPTA: May I approach, Your Honor?

25 THE COURT: Yes, you may.

1 THE WITNESS: This, also, is a document out of our
2 Cuyahoga County's poll-worker department for training
3 poll-workers on processing provisionals.

4 MS. GUPTA: Your Honor, we would move 1052 into
5 evidence.

6 THE COURT: Any objection, Mr. Keller?

7 MR. KELLER: No, Your Honor.

8 THE COURT: 1052 will be received.

9 MS. GUPTA: And I don't know if I moved into evidence
10 Plaintiffs' Exhibit 3027, which was the document on voting
11 history that we were looking at. So we would move for that
12 into evidence.

13 THE COURT: 3027, did you say?

14 MS. GUPTA: Correct, yes, 3027.

15 THE COURT: Any objection to 3027, Mr. Keller?

16 MR. KELLER: Just the objection that it wasn't on
17 their list, but no other objection. I don't know if you want
18 to make a continuing objection to that.

19 MS. GENTRY: Your Honor, do you want the explanation
20 on that?

21 THE COURT: Is that one that was on the supplemental
22 exhibit list?

23 MS. GENTRY: Yes.

24 THE COURT: And it was on the supplemental list
25 because --

1 MS. GENTRY: Because it was produced by Cuyahoga
2 County at their deposition, which I believe was last week. It
3 was after our initial list was provided.

4 THE COURT: I see. All right. I'm going to admit it.

5 MR. KELLER: Thank you, Your Honor.

6 MS. GUPTA: And the final thing I just want to make
7 sure we have on the record is that, as to the balance of the
8 exhibits, Plaintiffs' 1041 to 1055, plaintiffs and defendants
9 have stipulated as to those.

10 And I have no further questions.

11 THE COURT: Have you so stipulated?

12 MR. KELLER: That's correct, Your Honor.

13 THE COURT: All right.

14 Mr. Perlatti, you may step down. It's ten minutes to
15 1:00. We're going to stand in lunch recess until 1:45. It's
16 12:50 now. So, you may be excused. The lawyers may not.

17 THE WITNESS: Should I leave this document here?

18 THE COURT: Just leave everything where it is.

19 THE WITNESS: Thank you.

20 THE COURT: And, Mr. Perlatti -- Mr. Perlatti --

21 THE WITNESS: Yes.

22 THE COURT: -- you're to return for your examination
23 by the defense at -- Will 55 minutes give you ample time to get
24 some lunch?

25 THE WITNESS: Yes.

1 THE COURT: One forty five, we'll resume.

2 THE WITNESS: Thank you.

3 THE COURT: Now, are there -- It's kind of difficult
4 to narrow, because it doesn't seem that there is a definite set
5 of exhibits that are going to be used for each witness because
6 it seems that the testimony seems to shift, or at least the
7 questioning seems to shift, which is, I think, the point that
8 Ms. Carwile was attempting to make. So, to address that issue
9 and so that we can move through at greater dispatch, you can
10 take the amount of time you need on the discrete exhibits, but
11 what I don't want is for us to waste time determining whether
12 they have the exhibits, whether the defense has the exhibits,
13 and maybe it does but there may be different numbers associated
14 with the same exhibits. And so that's not something that we
15 should take court time with. That's something that should be
16 covered either on the breaks or at the conclusion of today.

17 Instead of wading through it tomorrow morning, we're
18 going to conclude at 5:00. And, at five o'clock, until
19 whatever time you're done, you're going to prepare the exhibits
20 for tomorrow's witnesses so that we can get through tomorrow's
21 witnesses without having to determine whether you have this
22 exhibit and what the number is. And that's what I want to
23 avoid. That doesn't prejudice either party because you still
24 have the opportunity to question the witnesses on the
25 respective exhibits, but I don't want us to waste time trying

1 to determine who has what.

2 Now, Mr. McTigue and Mr. Conover, I'm tasking you with
3 eliminating that problem for the next witness.

4 Who comes after Mr. McTigue's next witness? Who is the
5 second witness this afternoon after Mr. McTigue's?

6 MR. McTIGUE: Zach West, who is the operations
7 director and in-house legal counsel for the Ohio Democratic
8 Party. And he's been attending as our party representative.

9 THE COURT: So I am going to assume that he's not
10 testifying about the same type of exhibits as Mr. Perlatti.

11 MR. McTIGUE: No. There is no exhibits.

12 THE COURT: There are no exhibits. And how long do
13 you anticipate your next witness will be, not Mr. West, the
14 witness before Mr. West?

15 MR. McTIGUE: I anticipate that to be the same length
16 as whatever my direct was with Mr. McNair. And let me explain,
17 Your Honor. We were considering -- Brodi is correct. We were
18 considering going through some individual voter packets with
19 the witness from Hamilton County, but we've decided not to do
20 that. So, there is basically two exhibits, and that's
21 legislative testimony.

22 THE COURT: All right. Just as long as you sit down,
23 and I want to make sure that they have those two exhibits that,
24 you know, you referenced. And then we'll cover tomorrow -- At
25 the end of today's proceedings, I want to know who the

1 witnesses are, who has them, and whether you all have sat down
2 to go through the exhibits, at least to make sure with two
3 issues in mind: One, to make sure that the defense has the
4 exhibits that you plan to use and, secondly, that if they're
5 matters to which you can stipulate, you'll stipulate to them.
6 And then, you know, the other exhibits that require either
7 foundation or extended testimony, you could at least make sure
8 that everyone has them. And then you can inquire as the
9 situation may warrant.

10 So, that's going to be our approach for the remainder of
11 the trial.

12 Are there any issues from the plaintiff?

13 MS. GUPTA: No, Your Honor.

14 MS. GENTRY: No, Your Honor.

15 THE COURT: Mr. Conover, since you're standing, any
16 issues from the defense?

17 MR. CONOVER: Not at this point, Your Honor.

18 THE COURT: All right. We will reconvene at 1:45.

19 (Recess at 1:00 p.m.)

20 - - -
21
22
23
24
25

Thursday Afternoon Session

March 17, 2016

- - -

THE COURT: All right. Mr. Perlatti's daughter is in a science fair this evening at 6:00 in Cleveland, and he's going to be done and out of here by 3:00. That's not aspirational.

Mr. Keller, your examination.

MR. KELLER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. KELLER:

Q. Good afternoon, Mr. Perlatti.

A. Good afternoon.

Q. I know we met earlier, but my name is Zachery Keller. I'm counsel on behalf of the Ohio Secretary of State and the State of Ohio.

Are you affiliated with a political party?

A. Yes. I am a registered Democrat.

Q. Am I right in thinking then that the director is a Republican then? Is that how it works?

A. That is correct.

Q. And are you aware of what you have -- what fields of information you have to provide to register to vote in Ohio?

A. Yes.

Q. And what are those fields?

1 A. To register to vote you have to provide your printed
2 name, your date of birth, an address, a form of I.D., whether
3 it's last four of your soc or your driver's license number, and
4 you have to provide your signature, as well as attesting to
5 being a citizen. And also I think the other, I think you
6 attest to be -- to maybe not be convicted of a felony.

7 Q. And those first five fields that you went through, those
8 are the same as on the absentee envelope and the provisional
9 ballot affirmation?

10 A. That's correct.

11 Q. And, to your knowledge, have any of the registration
12 fields changed since you've been a part of the Board?

13 A. I am not aware of that.

14 Q. Mr. Perlatti, I'm going to show you what's been marked
15 as Plaintiffs' Exhibit 1042 which was recently admitted into
16 evidence by stipulation. It is in a binder over there, but
17 I'll show it to you on the Elmo also.

18 A. Okay.

19 Q. Do you recognize this document?

20 A. This looks like a provisional certification report that
21 we would send post-election, I think, with a certification.

22 Q. And which election was this one for?

23 A. This was November 3, 2015.

24 Q. And if you look at Section B, can you describe to me
25 what that section does?

1 A. B, as in boy, you said?

2 Q. Yes. Sorry.

3 A. It says reasons provisional ballots were rejected.

4 Q. And if you look down in that section, what reason had
5 the most rejections for the 2015 election?

6 A. So is the first number 770 in line 81 -- or is that B-1,
7 I'm reading?

8 Q. That's how I read it.

9 A. It's just not real focused.

10 Yeah, voter not registered in the State.

11 Q. If I have you look up at column -- or row, excuse me,
12 A-4, how many total ballots were rejected in the November 2015
13 election?

14 A. Yeah, it is 1272.

15 Q. And I'm going to ask you to do some rough math here.

16 Roughly what percentage then were rejected for not
17 registered in the State?

18 A. That is -- what is that? Two thirds, maybe?

19 Q. Now, I'm going to show you what has been marked as
20 Defense Exhibit 55. Do you recognize this document?

21 A. Yes. That's provisional form 12B.

22 Q. And what is that used for?

23 A. For provisional -- provisional voting in an election --
24 well, provisional voting on Election Day or during early
25 in-house voting.

1 Q. Does this appear to be a current version of that form?

2 A. Yes, it is.

3 MR. KELLER: Your Honor, at this time I would like to
4 move Defense Exhibit 55 into evidence.

5 THE COURT: Any objection, Ms. Gupta?

6 MS. GUPTA: None.

7 THE COURT: Defendant's Exhibit 55 will you received.

8 BY MR. KELLER:

9 Q. And if you look at this form, which fields are required?

10 A. Rows 1, 2, 3, 5 and 6.

11 Q. I'm sorry, my fault. What are those fields, though?

12 What are the names -- what are the --

13 A. Full name -- the full name, date of birth, current Ohio
14 address, identification and affirmation.

15 Q. Now, what happens if a non-registered individual
16 completes this form?

17 A. If a non-registered individual completes the form in
18 totality with all the fields, then on Election Day their ballot
19 will not be counted but the -- the provisional envelope serves
20 then as a registration card and we'll register them for the
21 next election.

22 Q. And what's the impact of that on future voting?

23 A. Well, now they are -- as long as -- you know, you can go
24 through the whole acknowledgment affirmation process through
25 it, but if everything comes back okay, they now are a

1 registered voter eligible to vote a regular ballot in the next
2 election barring that there's no address change or anything
3 like that.

4 Q. And I think you might have spoken about this on direct,
5 but just to make sure we have a clear record, to your knowledge
6 have the provisional ballot affirmation fields changed since
7 you started working for the Board?

8 A. The 12B form?

9 Q. Yeah, the fields required on that form.

10 A. They have changed.

11 Q. And what were the prior fields?

12 A. Prior to this it was full name, it was identification
13 and affirmation. Those were the parts for the voter. And then
14 also there was a section required to be completed by the poll
15 worker. And what I'm not -- what we did in Cuyahoga -- and I
16 wasn't part of the form myself before, but we also then printed
17 a registration card on the bottom of our provisional envelope
18 also.

19 Q. I'm going to show you what's been marked as Defense
20 Exhibit 58. Do you recognize this form?

21 A. Yes. This is the provisional 12B form that was prior to
22 the current version that we're using.

23 Q. And I'm going to flip to the backside. Is this similar
24 to what you were referencing?

25 A. That's -- yes, the registration card.

1 Q. All right. I'm going to turn back to the front.

2 Now, how many fields does this -- does this affirmation
3 have on it?

4 A. This has three.

5 Q. By completing those three fields, would a voter be
6 registered?

7 A. No, they would not.

8 Q. And if you look on the other side of the form, can you
9 read to me the line above the horizontal line at the top in the
10 smaller font right under the title?

11 A. The line under change of name?

12 Q. It starts with failure.

13 A. Okay. It's a little blurry, but I think it says failure
14 to complete this form will --

15 Q. I'll get it.

16 A. I think I can get it.

17 Failure to complete this form will not cause your
18 provisional ballot to be rejected.

19 Q. Can you describe to me the different stages the absentee
20 voting cures in?

21 A. What do you mean different stages?

22 Q. Well, do you apply -- first, how does the process -- the
23 general steps of the process work?

24 A. Yeah. So voting by mail or early in-house voting is a
25 two-step process. It starts with the application and which the

1 individual completes that application. And upon the
2 application being completed correctly, then Boards of Election
3 will send out a vote by mail ballot.

4 Q. And are the steps -- those two basic steps the same for
5 mail-in and early voting?

6 A. They are.

7 Q. And is it possible to mix and match methods as far as
8 in-person and mail-in?

9 A. What do you mean by mix and match?

10 Q. For example, could I go and pick up -- go apply for a
11 ballot at the Board, take it home with me and complete it and
12 then mail it in?

13 A. Yes, you could.

14 Q. Or could I do it the other way around?

15 A. Yes. You can request a ballot by mail mailed to you,
16 and you can physically bring that to the Board of Elections and
17 drop it off in the ballot box.

18 And, you know, vice versa, like you said, you can come
19 to the Board, request the ballot, receive the ballot and then
20 take that home with you, and either mail it in or come back at
21 a later date and deposit it in the ballot box at the Board of
22 Elections.

23 Q. Will the person necessarily be in the presence of an
24 election official when they complete their ballot and I.D.
25 envelope?

1 A. The I.D. envelope?

2 In-House they will get it there. They may start to fill
3 it out in front of the employee but they are not required to,
4 and they may not. They may take that with them to the voting
5 booth and then complete it in the booth with their ballot.

6 Q. What location is an Election Day voter supposed to vote
7 at?

8 A. Well, the thing is I'm going to give you, like, a
9 two-part there.

10 So an Election Day voter, if you -- so if you -- you can
11 go to the polls on Election Day and, if you have not had an
12 address change, you would go to your specific location where
13 your precinct is located and vote a regular ballot there.

14 If you did have an address change and you did not update
15 that with the Board of Elections prior to the close of
16 registration, you could do one of two things:

17 You could go to the polling location in which your new
18 updated address resides in and vote a provisional ballot at
19 that location, or you can -- on Election Day you can come to
20 the Board of Elections and vote a provisional ballot at our --
21 in our offices.

22 But only for address changes can you come -- can you
23 vote provisionally at the Board on Election Day.

24 Q. How common is it for someone to have moved without
25 updating their registration? Is that a frequent scenario, or

1 is it rare?

2 MS. GUPTA: Objection.

3 THE COURT: I'm sorry?

4 MS. GUPTA: Just objection on the basis of a compound.

5 THE COURT: Yes. I'm going to sustain it. Just break
6 up your questions, Mr. Keller.

7 BY MR. KELLER:

8 Q. How common is it for a voter to have moved without
9 updating the registration?

10 A. It happens every election.

11 Q. And I believe if I understood right, you said that's a
12 reason that -- that's one potential reason to vote
13 provisionally?

14 A. Yes. If you have -- if you've moved and not updated
15 your registration by the close of registration.

16 Q. Do you have any idea where that ranks as far as reasons
17 to vote provisionally as far as frequency?

18 A. Again, rank, I don't know, but it does happen in every
19 election.

20 Q. So for a person who wants to vote on Election Day who
21 has moved without updating their registration, where are they
22 supposed to go?

23 A. They are supposed to go to the polling location in which
24 their new address resides.

25 Q. So let's say I move from Columbus to Cleveland without

1 updating my registration. Do you understand the scenario I'm
2 setting up?

3 A. Uh-huh.

4 Q. So I'm going to show you again --

5 MR. KELLER: And, I apologize, Your Honor. If I have
6 not already, I would like to move Defense Exhibit 58 into
7 evidence.

8 THE COURT: Ms. Gupta, any objection to 58?

9 MS. GUPTA: No objection, Your Honor.

10 THE COURT: Defense Exhibit 58 will be received,
11 Mr. Keller.

12 MR. KELLER: Thank you, Your Honor.

13 BY MR. KELLER:

14 Q. So, again, we're in the scenario where I lived in
15 Columbus, I moved to Cleveland. Okay?

16 A. Uh-huh.

17 Q. So if I go to my new Cleveland address and were to just
18 fill out the information on the front side of Defense Exhibit
19 58, what would be the most recent address the Board of
20 Elections would have for me?

21 A. Cuyahoga County would not have an address for you. We
22 would then go to the statewide voter registration database and
23 that would have, in your scenario, whatever your Columbus
24 address was.

25 Q. So without further information, where would it look like

1 I should have voted?

2 A. From the -- just from the envelope alone, we would not
3 know. It would be based on the poll worker asking you where do
4 you reside and then you verbally telling them that, and then
5 they would attempt to find the precinct for you within Cuyahoga
6 County.

7 Q. And you wouldn't have that address?

8 A. No. They would verbally ask you to provide it at the
9 polls.

10 Q. But what about after the fact when you're checking my
11 provisional ballot?

12 A. Oh, no. When we're going -- post-election in the
13 provisional review, no, we wouldn't have -- from this unless
14 you completed the registration card which was on the backside
15 of the form.

16 Q. And it would look -- if I didn't do that, it would look
17 like I should have voted in Columbus; am I right there?

18 A. Well, if you didn't do that, we wouldn't be able to
19 validate your -- your provisional in Cuyahoga County.

20 Q. You had mentioned that one of the five fields across the
21 different processes was form of identification, correct?

22 A. Yes.

23 Q. And what is your understanding of what acceptable forms
24 of identification are when registering to vote?

25 A. Registering to vote? Last four of your social security

1 number or driver's -- and/or driver's license number.

2 Q. Are there any other acceptable documents?

3 A. I -- I do not think -- I don't believe so on a
4 registration.

5 Q. What about for provisionally voting?

6 A. Provisionally voting?

7 There is the opportunity to provide a utility bill, a
8 bank statement, things like that. I think you can attach that.

9 Q. And if we look at field number 5 for Defense Exhibit 55,
10 is that the list of acceptable provisional identification?

11 A. Yes.

12 Q. Do voters have to use the same form of identification
13 they used when registering when they vote?

14 A. No, they don't.

15 Q. You had mentioned in your earlier testimony, I
16 believe -- and correct me if I'm wrong -- that sometimes you
17 have to search county or statewide databases for provisional
18 voters.

19 A. Yes. When we -- every provisional that we process, we
20 have to -- we utilize those two databases.

21 Q. And are you able to search by more than one information
22 field when you're searching for a voter?

23 A. Yes.

24 Q. And what does searching by more than one field do to
25 your search?

1 A. The -- the increased number of fields can reduce the
2 number of potential records to choose from. So, you know, if
3 you put in just name, you may -- you may -- if it's a common
4 name, it may return a list of individuals. And then as you add
5 more criteria, that list shrinks and shrinks.

6 Q. Sir, I'm going to show you what's been marked as
7 Plaintiffs' Exhibit 1054, which has been moved into evidence
8 pursuant to stipulation. And if you want to see the whole
9 document, I believe it's in Volume 13 in front of you.

10 A. Could I see the top of it just real quick?

11 Q. I'll zoom out.

12 A. Okay.

13 Q. Do you recognize this?

14 A. I think this is our registration department DIMS
15 provisional training -- training document -- or document that
16 they have when they're processing.

17 Q. What is DIMS?

18 A. I'm sorry. DIMs is the registration database that
19 Cuyahoga County utilizes.

20 Q. I'm going to ask you to turn to, I believe it's the
21 second page.

22 A. Which document am I going to here?

23 Q. It's still the same document. It's Bates stamped
24 Cuyahoga -- or CUY126.

25 A. Do you have a tab number?

1 Q. It's Plaintiffs' Exhibit 1054. I apologize.

2 A. Okay.

3 Q. Are you there?

4 A. Yes.

5 Q. Do you see towards the bottom of the page the field that
6 starts with bullet point 6?

7 A. Hold on. I have some blank pages in here.

8 Q. I have it up on the screen, too.

9 A. Okay. Bullet point number 6? Is that --

10 Q. Yes.

11 A. That effectively search the DIMS database there? Start
12 search by using the first three letters?

13 Q. Yes, that's what I meant. Are you there?

14 A. Yes.

15 Q. What do those bullets reflect? What is that?

16 A. This is different search criteria that the employee
17 would utilize when trying to locate a voter in the registration
18 database.

19 Q. And how many are -- how many different searches are
20 listed there?

21 A. There's eight on this page, eight combinations.

22 Q. Of those eight combinations how many include either date
23 of birth or address?

24 A. Five.

25 Q. Earlier I asked you -- I had -- I showed you, and I can

1 show you again, Plaintiffs' Exhibit 1042 that had reasons for
2 rejection. Is it possible that an absentee or a provisional
3 ballot can have more than one deficiency?

4 A. Yes.

5 Q. When you report it to the Secretary of State after an
6 election, do you pick one, or are there different codings?

7 A. I believe that they -- they just pick one. We don't
8 necessarily have a hierarchy, but they select one.

9 Q. Does your Board have any online options that a voter can
10 utilize when tracking a ballot?

11 A. Yes.

12 Q. What can they do?

13 A. On our website -- let me see.

14 After you -- when we -- when we process the application,
15 I believe a person can find that on our website. And then when
16 we mail the ballot, that's a date that they can watch when the
17 ballot is returned. That's a date that they can view from our
18 website.

19 Q. And in addition to any online resources, do voters ever
20 call the Board?

21 A. Asking that information?

22 Q. Correct.

23 A. Yes, they do.

24 Q. Can they ask other questions of the Board?

25 A. They can -- they can ask us all kinds of questions.

1 Q. And do they ever -- in addition to calling, does anyone
2 ever show up to the Board with questions?

3 A. The public can -- they can come in and ask questions.

4 Q. And what do you do to assist voters when they come in
5 and ask questions?

6 A. Well, depending what the question is, we will direct
7 them -- we'll try to direct them to the appropriate department
8 for them to get answers to their questions.

9 There's another tool that Cuyahoga has as far as
10 tracking your ballot. It's something new that we implemented
11 this year. It's called Voter Notify, and that's a service
12 where voters where subscribe to this, and they can elect to
13 either have a text message or an e-mail or both sent to
14 whatever they registered when they subscribed. And what
15 happens is when the Board mails out a ballot, then we will send
16 either the text or e-mail or both, whatever they signed up for.
17 And then when the Board receives their ballot back, we will
18 send out again either a text, e-mail or both, depending on what
19 they subscribed for.

20 Q. I'm going to shift gears for a moment.

21 Can you describe to me the basic timeline for absentee
22 voting?

23 A. As far as what the window is in which people can
24 participate?

25 Q. Absolutely.

1 A. Absentee voting starts the first day after the close of
2 registration.

3 Q. And how long does it run?

4 A. Vote by mail, until then you can request to receive an
5 absentee ballot through 12 noon on the Saturday prior to
6 Election Day, and you can come in and vote in person through
7 2:00 o'clock on the Monday before Election Day.

8 Q. And when is the first time the Board counts either
9 officially or unofficially absentee ballots?

10 A. As far as tabulating the results?

11 Q. Yes.

12 A. The results are -- well, there's a whole process prior
13 to Election Day in getting the ballots prepared, but counties
14 are required to vote by 7:45 on Election Day their absentee
15 ballots, as well as any in-house ballots by 7:45. They may not
16 expect it really to happen on Election Day, but you will
17 include those eventually, the in-house Election Day voters.

18 No, I'm sorry, the provisional. So they wouldn't be
19 included in that total.

20 Q. The provisional wouldn't?

21 A. No, they would not because you can't process -- you
22 can't open a provisional until 11 days after the election.

23 Q. And my question might have been unclear. What about
24 absentee, when are absentee first counted?

25 A. Boards of Elections 10 days prior to an election are

1 able to physically open up the identification envelope and
2 remove the ballots from those envelopes, and then they are able
3 to -- well, we're optical scan. So I can't speak to DREs
4 because I'm not sure -- I think in those counties they actually
5 vote on TSX machines, I'm positive, or a touch screen.

6 But in Cuyahoga in an optical scan environment we can --
7 for both by mail and in-house voting, we can start to open
8 those ballots 10 days prior to the election, and at that point
9 in time, too, you can start to run those ballots through
10 scanners to collect what the results are but you can't upload
11 any of those.

12 And then those -- those -- in our system it's a USB
13 thumb drive. Those results are saved in a safe, and then on
14 Election Night those come out and that is what is uploaded
15 between 7:30 and 7:45.

16 Q. Based on your experience -- and I'm only looking for an
17 estimation here -- what percentage of absentee ballots would
18 you say are received by Election Night?

19 A. We have -- in Cuyahoga we probably average between 85
20 and 90 percent return rate on our absentee ballots. Of those
21 requested, 85 to 90 percent is typically returned.

22 Q. Now, I want to talk about the timeline for provisional
23 voting. When do those provisional ballots get cast?

24 A. On Election Day.

25 Q. So when -- how does the process work then for -- for

1 processing them and counting provisional ballots?

2 A. So on the day following Election Day in Cuyahoga we --
3 I'll speak to Cuyahoga specifically because that's what I know,
4 but this applies to a lot of the State.

5 You -- you begin then on the day after an election, you
6 are able to start to review those provisional envelopes to see
7 if all their criteria is met and do your processing of them.

8 The ballots have to remain within the provisional
9 envelope. And so you go through that process, and on the 11th
10 day following the election is the first time where you have an
11 opportunity to actually open the provisional envelopes and take
12 the ballots out.

13 Now, Boards of Election are not required to be done with
14 their verification within 10 days; you can go past that if you
15 need more time. But that's the first opportunity you have to
16 do that.

17 And prior to opening any provisional envelopes, Boards
18 of Election have to have a meeting of their Board members in
19 which the Board members take a vote on accepting or
20 invalidating provisional envelopes.

21 Q. What's the general timeline for that meeting? When does
22 that take place?

23 A. Well, the earliest it can happen is 11 days, on the 11th
24 day after the election.

25 Typically, in Cuyahoga we don't have it on the 11th

1 because the 11th, I believe, typically is a Saturday so we will
2 have that meeting usually on the following Monday or Tuesday.

3 Q. Can the Board determine the validity of provisional
4 ballots on a rolling basis, or does it happen all at the same
5 time with the provisional ballots?

6 A. It happens all at the same time.

7 Q. So could it happen before the cure period ends?

8 A. Could that meeting happen before?

9 The meeting -- well, the meeting could happen before;
10 however, if someone came in and the cure period was still going
11 on and they cured their ballot, then you'd have to have another
12 meeting in order to rule on that once previously deemed invalid
13 provisional. We would have to vote then to make that valid.

14 Q. You had mentioned that the voter determination generally
15 consists of all the provisional ballots at the same time, or am
16 I --

17 A. Yes. Yes, you want to present everything at one time.

18 Q. How big is Cuyahoga in comparison to other Ohio
19 counties?

20 A. As far as registered voters?

21 Q. Yes. Let's start there.

22 A. Cuyahoga has the highest number of registered voters in
23 the State of Ohio.

24 Q. How many staff do you have at your Board of Elections?

25 A. We have about 95 permanent employees. And then like

1 most Boards of Election, when you get into what we consider the
2 election cycle, you bring on temporary resources to assist
3 them.

4 Q. Are you aware of the general staffing of other Boards?

5 A. I -- I -- I am not other than I've heard that we have
6 the most permanent employees.

7 Q. I'm going to show you what has been marked as
8 Plaintiffs' Exhibit P2984, and I'm going to turn to the second
9 page of that document.

10 Ms. Gupta had asked you some questions about this. I
11 just want to make sure I understand where -- what this
12 information consists of.

13 If you look at the -- so the snapshot is sort of divided
14 into a smaller box on top and a bigger box below; does that
15 sound right?

16 A. Yes.

17 Q. So in the top box you have a name and an address and
18 some other identification information, correct?

19 A. That's correct.

20 Q. Are you aware of whether that information is from the
21 time the snapshot is taken, or is it from the time the ballot
22 that this is connected to was evaluated?

23 A. Can you repeat that again?

24 Q. I'm wondering if -- I'm just trying to make sure I
25 understand what this -- the timing of this information on top

1 here that consists of Ms. Turner's address and I.D.
2 information.

3 A. And this is what I was speaking to before.

4 When we're in live time with the election, that
5 information will be current with what's in our voter
6 registration database.

7 What I -- what I'm not sure is now once we get past the
8 election and data entry resumes again, I don't -- so this
9 snapshot, I don't know, you know, if this is updated or not.
10 And that's where before, like with the IT department or even
11 our -- the assistant manager of the absentee process, Patrick
12 McCauley, he would be able to better tell you because I believe
13 this snapshot was taken post-election in the process of
14 providing documents for this case.

15 So I can tell you, like, what's on there, but whether
16 that module stays the same for a specific election indefinitely
17 or if that changes that, I'm not sure because I've only kind of
18 worked with it in live time when you're in the voting window.

19 Q. And this question is not about this specific snapshot,
20 but am I correct in thinking the database information itself
21 can change and be updated?

22 A. The -- well, again, there's -- you have DIMS, as we
23 talked about, the registration database which is the main --
24 the main database, and then there's the different modules that
25 are all affiliated with it, absentee, provisional, poll worker

1 module, campaign finance module. So all these different
2 modules feed into the master data, the master data being put in
3 by the registration department with the registration cards and
4 things like that. So these other modules feed off of that
5 data.

6 Now, the interaction between them, where the live
7 registration database, you can make changes to that and, yes,
8 those happen in realtime. And that's why I said previously,
9 like, we lock down the database on the close of registration,
10 and then it opens back up again pretty much the day after we
11 certify the election. And then you put your data in there
12 because that -- that live main database will change.

13 How it affiliates with the modules, that technical
14 piece, I don't know. Someone in our office will know that, but
15 I'm not the guy who knows and can't give you that today.

16 Q. Okay. I think I understand. Thank you.

17 MR. KELLER: May I have a moment to confer with
18 co-counsel?

19 THE COURT: Yes.

20 MR. KELLER: I have no further questions at this time,
21 Your Honor.

22 THE COURT: Thank you, Mr. Keller.

23 Ms. Gupta, do you have any recross?

24 MS. GUPTA: I do, Your Honor. Just a few questions.
25

RE CROSS-EXAMINATION

BY MS. GUPTA:

Q. Mr. Perlatti, Mr. Keller was asking you about the timing of the determination that the Board makes regarding the validity of provisional ballots, correct? Do you remember that?

A. Yes.

Q. And he was asking you about the -- whether it was on a rolling -- whether the validity determination is on a rolling basis or whether it happens all at once, right?

A. Correct, yes.

Q. Okay. Now, isn't it the case that this -- that, although the Board makes the final validity determination all at one time, the staff is actually determining the validity of provisional ballots earlier than that?

A. Right. The day after the election is when staff starts to review provisional envelopes and will -- depending on the volume can do that for multiple days to get through all that process to get through them all. And then that's why when we have our Board meeting -- and I don't recall having a Board meeting prior to the 11th day. Typically it's, you know, after when they're able to be opened and we want to present everything at one time.

So we are working on that process throughout the window from Election Day until we have that Board meeting getting

1 everything prepared to then present that to the Board members
2 for them to take -- take their vote.

3 Q. Mr. Keller also asked you about online options for
4 providing notice, I believe.

5 A. Yes.

6 Q. Now -- and he referred also -- I think I believe you
7 testified to something called Voter Notify?

8 A. Yes.

9 Q. Now, do those -- those don't apply to provisional
10 ballots, do they?

11 A. No. That's just for absentee. And, in fact, the
12 thing -- the information on our website was actually mandated
13 of all counties by the Secretary of State's office so everyone
14 has to be able to have that information available to track the
15 ballots.

16 Voter Notify is unique to Cuyahoga County. It's
17 something that we do that, again, people can subscribe to;
18 they're not forced to do it.

19 For provisionals all that there is is, kind of what we
20 talked about before, the 12H form that should be given when the
21 provisional is given. And if someone wants to -- what do we
22 call it? I think -- I believe it's the Free Access System is
23 part of that phone number, and they can call and they'll get
24 placed then with their appropriate county and someone can
25 inquire on their own provisional ballot whether it was valid,

1 invalid, and what the reason is.

2 Q. Mr. Keller also asked you about the fields that are
3 required for registering to vote, correct?

4 A. Yes.

5 Q. Isn't it true -- would you -- excuse me.

6 Will you agree that you could keep the information --
7 the five fields information for purposes of registering a voter
8 without disqualifying other ballots based on an error in those
9 ballots -- excuse me, in one of those five fields?

10 A. On a provisional ballot?

11 Q. Yes.

12 A. Again, we're required by law now that all five fields
13 have to be completed, and we comply with that and we can find
14 voters. And prior to the law change there was three fields
15 required, and we were able to find voters and approve
16 provisionals and we were able to comply with that.

17 So we -- we comply with the rules that are given to us,
18 and we were successful in both environments.

19 Q. I believe when Mr. Keller was questioning you, you
20 testified to the fields that were required on the previous
21 provisional affirmation form and you mentioned a section that
22 had to be completed by the poll worker, correct?

23 A. Yes.

24 Q. Do you know of any rationale for having the individual
25 voter in the new affirmation form having to check off the box

1 regarding whether they showed identification?

2 A. I don't know why that -- why that is there for the voter
3 to check that and not the poll worker.

4 MS. GUPTA: Thank you.

5 Just a moment, if I may confer.

6 One last question, Mr. Perlatti.

7 BY MS. GUPTA:

8 Q. We talked about -- and I believe this came up as well in
9 Mr. Keller's examination as well -- is the ability to identify
10 the absentee voter as compared to the provisional voter.

11 Isn't it the case that for absentee voters, there is
12 also a barcode that helps identify that voter?

13 MR. KELLER: Objection, Your Honor. This is outside
14 the scope of my questions.

15 THE COURT: It is. Sustained.

16 MR. KELLER: Thank you, Your Honor.

17 MS. GUPTA: No further questions.

18 THE COURT: I trust that you have nothing further,
19 Mr. Keller? Or do you?

20 MR. KELLER: I do not, Your Honor. You are correct.

21 THE COURT: Mr. Perlatti, thank you very much, sir.

22 THE WITNESS: Thank you.

23 THE COURT: Have a safe trip back and enjoy the
24 science fair.

25 THE WITNESS: I will.

1 THE COURT: Mr. McTigue, your next witness.

2 MR. McTIGUE: Mr. Tim Burke.

3 Sorry that took so long, Your Honor. Mr. Burke was all
4 the way down the hallway in the jury room.

5 THE COURT: Oh, I see.

6 - - -

7 TIMOTHY MICHAEL PATRICK BURKE

8 AFTER HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

9 CROSS-EXAMINATION

10 BY MR. McTIGUE:

11 Q. Could you State your name and spell your last name,
12 please?

13 A. Timothy Michael Patrick Burke, B-U-R-K-E.

14 Q. And, Mr. Burke, you are a member of the Hamilton County
15 Board of Elections, correct?

16 A. I am chairman of the Hamilton County Board of Elections,
17 yes.

18 Q. And you are a Democrat?

19 A. I am.

20 Q. And how long have you been a member of the Board of
21 Elections?

22 A. Approximately 24 years.

23 Q. Okay. And I suppose -- during that 24 years, how long
24 have you served as chair?

25 A. Approximately 20.

1 Q. Okay. And you are also a licensed attorney in the State
2 of Ohio?

3 A. I am.

4 Q. And you also teach election law; is that correct?

5 A. I frequently teach continuing legal education programs
6 in election law.

7 Q. Okay. Now, Mr. Burke, are you familiar with Senate Bill
8 205 and Senate Bill 216?

9 A. I am generally, yes.

10 Q. Okay. And did you provide written testimony to the Ohio
11 General Assembly regarding these two bills?

12 A. I did.

13 Q. Okay. And I'm going to now put on -- if you can check
14 your monitor, I'm going to put up what is marked as Plaintiffs'
15 Exhibit 1214.

16 A. I see it.

17 Q. Okay. And can you identify this document?

18 A. Yes, sir. It's a letter I wrote. It's dated
19 February 15, 2014. It was prepared in my law office, even
20 though it's on Board of Elections stationary.

21 Q. And this was sent to the chairman of the Policy and
22 Legislative Oversight Committee and the Ohio House, correct?

23 A. That's correct.

24 Q. Mr. Dovilla?

25 A. Correct.

1 Q. And it appears from the body of this that it relates
2 to -- I see reference in the third paragraph to SB 216?

3 A. Yes, sir.

4 Q. So what prompted you to send this testimony to the
5 chairman of the committee?

6 A. There was -- as the letter states, there was a
7 concern -- I had a concern, as did some others, that that bill
8 had the potential to operate to disenfranchise certain voters.

9 Q. And specifically what was the concern?

10 A. That the requirements that were going to be imposed were
11 going to make it far more likely that voters would make
12 technical mistakes and their ballot would end up being
13 disqualified in spite of the fact that they were duly qualified
14 and registered voters.

15 Q. So let me -- let me break that down for a second, your
16 answer.

17 So we're talking about provisional ballots, correct?

18 A. Yes, sir.

19 Q. And you're talking about specific fields such as the --
20 having to print your name?

21 A. Yes, sir.

22 Q. And having to provide your date of birth?

23 A. Yes, sir.

24 Q. And having to provide an address?

25 A. Yes, sir.

1 Q. Okay. And an I.D.?

2 A. Yes, sir.

3 Q. Okay. And there are various options for the I.D.?

4 A. Yes, sir.

5 Q. And then, finally, a signature?

6 A. Correct.

7 Q. Okay. And is it the case that Senate Bill 216 required
8 that the printed name field actually be printed rather than
9 cursive?

10 A. There was certainly one place where that was an
11 obligation, absolutely, yes.

12 Q. So was your reading then of the requirements that if --
13 just using myself as an example, if I was to where it said
14 print your name and I was to write it and then I signed at the
15 bottom in my -- you know, in my signature on the signature line
16 and it was legible, you would still have to reject that ballot?

17 A. I believe that's right.

18 Q. Because I didn't print my name.

19 A. Correct.

20 And we had gone through a situation based on a directive
21 from the Secretary of State's office where an elderly voter had
22 filled out that provisional envelope, everything correctly.
23 Her signature where it was required to be a signature at the
24 bottom matched our records entirely. There was absolutely no
25 dispute from anybody on the Board or staff that what was inside

1 that envelope was a ballot cast by a valid registered voter.

2 But this little old lady had neglected to print her name on the
3 top of the provisional envelope, and we had to reject --

4 MR. CONOVER: Objection.

5 THE COURT: Go ahead, Mr. Conover.

6 MR. CONOVER: I'd move to strike the answer as the
7 printed name is not an issue in this case.

8 MR. McTIGUE: Actually, Your Honor, I believe that the
9 printed name is one of the allegations in the complaint. It's
10 not --

11 THE COURT: I'll hear you at sidebar, Mr. McTigue.

12 - - -

13 Thereupon, the following proceeding was held at sidebar out
14 of the hearing of the open courtroom:

15 THE COURT: Go ahead, Mr. McTigue.

16 MR. McTIGUE: Yes. I believe that the -- in the
17 complaint that there is a reference to the printed -- the
18 requirement to print your name. I believe it is part of the
19 lawsuit. It's -- or, I mean, to give some credence to the
20 objection, we haven't really been hammering away at that issue,
21 but it is in the complaint.

22 THE COURT: Mr. Conover?

23 MR. CONOVER: Your Honor, I think the only two new
24 requirements from Senate Bill 216 and 205 were name and
25 address, not printed name.

1 MR. McTIGUE: Actually, Your Honor, in the House Bill
2 it had -- it had a requirement for a name, and they inserted in
3 205 -- inserted the word printed in front of the name. So that
4 has been inserted into 205 as being a print requirement.

5 THE COURT: The testimony has been fairly consistent
6 that the two new requirements under -- in 205 were date of
7 birth and address.

8 Now, do you dispute, though, Mr. Conover that the
9 printed name was raised in the complaint?

10 MR. CONOVER: I think, Your Honor, again that it would
11 be the date of birth and current address. The complaint is
12 long. I don't have every word memorized.

13 THE COURT: But you don't dispute that the printed
14 name was a part of the complaint in this case?

15 MR. CONOVER: Can I ask my co-counsel?

16 THE COURT: Yes, you can confer.

17 MR. CONOVER: I think, Your Honor, that 205 and 216,
18 again, were the date of birth and current address, and that the
19 directive that the witness was testifying about predated those
20 laws that required a printed name.

21 THE COURT: All right. I'm going to allow it, but I
22 take it that this is the only question about the printed name.

23 MR. McTIGUE: Yes.

24 THE COURT: I'm going to overrule your objection on
25 the theory that it's part of the complaint, even though it is

1 not part of what has been the thrust of the testimony thus far.

2 (Back in open court.)

3 THE COURT: Please continue, Mr. McTigue.

4 BY MR. MCTIGUE:

5 Q. Mr. Burke, Senate Bill 205 added a new requirement for
6 the voters to provide a date of birth, correct?

7 A. It's my understanding, yes, sir.

8 Q. Okay. And previous to 205 coming into effect, was the
9 Board of Elections hampered in its ability to validate or, you
10 know, identify the eligibility of a provisional voter without
11 the date of birth?

12 A. Absolutely not.

13 Q. Okay. Can you recall specific examples or --

14 A. I can't recall any examples where we needed the date of
15 birth in order to verify that a voter was a valid voter.

16 Q. Okay. And what is your understanding of 205's
17 requirement now on date of birth in terms of it being
18 completely blank as opposed to it being incorrect?

19 A. My understanding is that if it's completely blank, we
20 must reject it. If there is an in-correction and we can
21 determine from the body of the rest of the documentation that
22 it's a valid vote, we can accept it.

23 Q. Okay. And since 205 came into effect, what has been the
24 practice of the Hamilton County Board of Elections with respect
25 to date of birth problems; meaning, specifically where the date

1 of birth information was incorrect?

2 A. On provisional ballots?

3 Q. Yes.

4 A. If we have had that kind of a problem, it gets presented
5 to the Board typically with a recommendation from the
6 bipartisan staff as to whether or not to accept it.

7 And we examine it -- in an open meeting of the Board of
8 Elections we examine the provisional ballot envelope, we hear
9 what the staff has to say, we look at whatever other
10 documentation we may have, and we make a determination.

11 Q. Okay. And can you recall any instances since 205 has
12 come into effect where the Board has voted to reject a
13 provisional ballot due to an address -- an -- I'm sorry, an
14 incorrect date of birth?

15 A. As I sit here today standing alone, I can't say that I
16 can.

17 Q. Okay. But has it been fairly consistent policy of the
18 Board to -- as long as the other fields are filled in, the
19 other four fields, has it been the fairly consistent policy,
20 can you say that at least, what that consistent policy -- I'm
21 sorry, the fairly consistent policy has been?

22 A. Well, I think the consistent policy is that, first of
23 all, we look at the signature and does the signature match our
24 records. And then, if necessary, we would look at the other
25 material that's on that and make a determination.

1 And certainly if the signature matches, that's going to
2 be the overwhelming basis on which we make the decision and
3 would approve the ballot.

4 Q. Okay. And with respect to the address on a provisional
5 affirmation form, the address was not previously required,
6 correct?

7 A. Correct.

8 Q. And previously was the Board able to identify the
9 eligibility of a voter without the address?

10 A. Yes.

11 Q. Can you recall any instances where the Board was not
12 able to?

13 A. The only circumstances that I can even think of when the
14 Board might not be able to in the first instance is if it was a
15 voter who was voting a provisional ballot and had previously
16 been registered outside the county.

17 Q. Okay.

18 A. That would have been a problem for us initially without
19 having an address.

20 Q. Okay. And then -- but you also had, both prior to 205
21 and since 205, an I.D. requirement, correct?

22 A. Correct.

23 Q. So you could look it up either based on an Ohio driver's
24 license number or a social security number?

25 A. Correct.

1 Q. And so in that manner, would you be able to identify the
2 eligibility of that voter within the statewide voter
3 registration database?

4 A. Yes, we would have been.

5 Q. Okay. Now, with respect to Exhibit 1214, is that a true
6 and accurate copy of your testimony, your written testimony?

7 A. I can't see the exhibit number on what's on the screen
8 at the moment but, yes, if that's -- yes, that is a true and
9 accurate copy of the letter that I prepared and signed.

10 Q. Okay. And you submitted that -- even though you are
11 referring to it as a letter and it's in the form of a letter,
12 you consider that to be testimony?

13 A. I do.

14 MR. McTIGUE: Okay. Your Honor, at this time I would
15 move for admission of Plaintiffs' Exhibit P1214.

16 THE COURT: Any objection, Mr. Conover, to P1214?

17 MR. CONOVER: Your Honor, I think we're just going to
18 continue to make a written testimony objection that we would
19 continue to make, but other than that, no objection.

20 THE COURT: It will be received.

21 BY MR. McTIGUE:

22 Q. Now, Mr. Burke, I'm going to show you Plaintiffs'
23 Exhibit No. 1218.

24 A. I see that.

25 Q. Okay. So this is a two-page document so I'm going to

1 first show you the first page. And when you're done looking at
2 that, I'll turn to the second.

3 A. I'm fine.

4 Q. Okay. Have you had a chance to look at that?

5 A. Yes, sir, I have.

6 Q. Okay. And can you identify what this document is?

7 A. It is a letter which I prepared. It was prepared in my
8 office. It, again, is written testimony submitted to the chair
9 of the Policy and Legislative Oversight Committee. It related
10 to the two bills that are identified in the body of the letter.
11 It was e-mailed from our office to the committee.

12 Q. Okay. And I'm going to draw your attention to the
13 second page.

14 A. Yes, sir.

15 Q. The first page that I just took off the screen was
16 Senate Bill 238 which has to do with Golden Week, correct?

17 A. Yes, sir.

18 Q. But the second page relates to Senate Bill 205, correct?

19 A. Yes, it does.

20 Q. Okay. Can you explain what your concern here was?

21 A. There were two issues involved. One was the restriction
22 on the ability of local Boards of Election to mail to a voter
23 an application for an absentee ballot when they hadn't
24 specifically asked for it. We had been in the practice of
25 mailing applications for absentee ballots to all registered

1 voters in the county. This bill prohibited us from doing that.

2 Secondly, there was a concern about this bill that was
3 similar to the concern we just talked about that required more
4 information to be supplied by the voter at the peril of not
5 providing that information, not having their ballot counted.

6 Q. And the information you're speaking of would be
7 information that the voter would have to provide on what is
8 known as the I.D. envelope?

9 A. Yes, sir.

10 Q. And that's the envelope that the voter puts his/her
11 ballot in. And then if they're voting by mail, they would put
12 that in another envelope and mail it back?

13 A. Correct.

14 Q. Okay. And with regard to Senate Bill 205's requirements
15 that we were just speaking of, what were the new requirements?

16 A. My understanding is that the new requirements included,
17 again, the birth date, it included address. And, again, as I
18 sit here, I'm not sure what the other new requirements were off
19 the top of my head.

20 Q. Now, the I.D. envelope that existed prior to 205 had
21 those two fields, address and birth date; correct?

22 A. I believe that's true, yes, sir.

23 Q. What was the practice of the Hamilton County Board of
24 Elections pre-Senate Bill 205 if the birth date wasn't filled
25 in on an I.D. envelope?

1 A. Typically, our staff would pick up the phone and call
2 the voter.

3 Q. Okay.

4 A. Prior to the adoption of this bill and prior to the
5 direction of the Secretary of State that prohibited that from
6 happening.

7 Q. Okay. And so let's say the staff reached a voter, and I
8 assume that would be to ask what their birth date was?

9 A. Yes, sir.

10 Q. And then what would the staff do with that information?

11 A. Fill it in.

12 Q. Okay. On behalf of the voter?

13 A. Correct.

14 Q. Okay. Let's take a scenario where the staff made an
15 attempt to reach out to the voter and was not successful.

16 What was the Board's policy in terms of -- about whether
17 the absence of the birth date or an incorrect birth date was a
18 fatal flaw?

19 A. Until this bill, we did not treat it as a -- on a
20 bipartisan basis, we didn't treat it as a fatal flaw. Again,
21 we had the voter's signature. If it matched our records, it
22 was the best evidence that this was a valid voter's ballot.

23 Q. And with regard to the address on the I.D. envelope
24 pre-Senate Bill 205, did the Board of Elections pre-populate
25 the name and address fields?

1 A. Frequently, yes.

2 Q. Okay. So when the ballot was mailed to the voter along
3 with the I.D. envelope, the name and address would already be
4 filled in?

5 A. Correct.

6 Q. Therefore, there wouldn't be a cause for the Board to
7 reject an absentee ballot on the basis of a missing address?

8 A. Correct.

9 Q. Now, this Exhibit Number 1218 is this a true and
10 authentic copy of your testimony?

11 A. Again, I can't see the exhibit number on the screen at
12 the moment, but the document that's on the screen is a true and
13 accurate copy of the letter that was prepared in our office
14 that I signed.

15 Q. Okay. And I just put it on the screen.

16 A. Yes, sir, and I can see that now. It is a true and
17 accurate copy of my letter.

18 MR. McTIGUE: Your Honor, at this time I would move
19 admission of Plaintiffs' Exhibit P1218.

20 THE COURT: Any objection, Mr. Conover?

21 MR. CONOVER: Just the same continuing objection.

22 THE COURT: P1218 will be received.

23 MR. McTIGUE: Thank you, Your Honor.

24 BY MR. McTIGUE:

25 Q. Mr. Burke, with regard to the birth date issue on either

1 absentees or -- absentee envelopes or provisional forms, have
2 you received any instructions from the Secretary of State's
3 office -- and by you, I mean the Board -- as to whether or not
4 the Board may contact voters by telephone or e-mail or text
5 message regarding -- to either fill in or clarify a birth date
6 problem?

7 A. We've been instructed that we cannot contact voters that
8 way.

9 Q. Okay. So --

10 THE COURT: Who instructed you?

11 THE WITNESS: The Secretary of State. The Secretary
12 of State's office.

13 THE COURT: In a directive?

14 THE WITNESS: That's my recollection, Your Honor, yes.

15 THE COURT: And do you remember approximately when you
16 were so instructed?

17 THE WITNESS: I'm sorry, Your Honor, I do not.

18 THE COURT: All right.

19 Please continue, Mr. McTigue.

20 MR. McTIGUE: Thank you, Your Honor.

21 BY MR. McTIGUE:

22 Q. And with regard to an absentee voter who has a birth
23 date issue on their envelope, the Board sends Form 11S by mail
24 to the voter, correct?

25 A. That is correct.

1 Q. Okay. And that is the only way in which the Board
2 provides notice to that absentee voter?

3 A. That is now my understanding. And the problem that
4 creates is that can frequently be too late in the process.

5 Q. Absentee ballots under the law can be counted by the
6 Board if they are postmarked the day before the election and
7 received no later than 10 days after, correct?

8 A. That's my understanding, yes.

9 Q. The cure period for a voter to come in and fix their
10 I.D. envelope ends 7 days before -- I'm sorry, 7 days after the
11 election?

12 A. I believe that's right.

13 Q. So the cure period actually ends earlier than the time
14 period for a ballot to come in?

15 A. Yes, sir.

16 Q. Now, with respect to provisional voters, are provisional
17 voters sent any kind of notification similar to Form 11S
18 regarding a birth date problem on their provisional form?

19 A. Mr. McTigue, I'm not sure.

20 Q. Okay. Do you recall or do you know whether or not under
21 the law a provisional voter is permitted to come into the Board
22 of Elections' office with or without notice previous to them --
23 by the Board? Are they entitled to come in to the Board of
24 Elections' office at any time after the election to cure a
25 birth date problem?

1 A. For a 10-day period.

2 Q. But is it to cure the birth date problem or only I.D.
3 problems?

4 A. Again, I'm not sure.

5 Q. Okay. So one of the things that both of these senate
6 bills did was to shorten the cure period from 10 days to 7
7 days, correct?

8 A. Yes, sir.

9 Q. Okay. So, if you know, typically before these bills
10 took effect, how many voters would come in on days 8, 9 and 10
11 to fix a problem on either their provisional form or their
12 absentee?

13 A. Certainly a very few voters would come in during that
14 period of time. I don't have a specific number for you.

15 Q. Okay. Would you say that the number would be de
16 minimis?

17 A. Yes, sir.

18 Q. Would the number -- would the number of voters that came
19 in during those days, would they increase the costs -- would it
20 increase operating costs for the Board of Elections to process
21 them?

22 A. Not at all, because our staff is there.

23 Q. Would having them come in during those last three days
24 somehow delay when the Board could conduct its official count?

25 A. No, not at all, because we can't do the official count

1 of provisional ballots and any other late arriving ballots
2 until 10 days have passed so it doesn't slow that down at all.

3 Q. Do you know if your provisional ballots are not -- not
4 the ballots, but the I.D. envelopes that are mailed to voters
5 have bar codes on them?

6 A. They do.

7 Q. And so those bar codes are unique to each voter,
8 correct?

9 A. I believe that's correct.

10 Q. And so the barcode would track that this voter had an
11 application for an absentee ballot, then this is the envelope
12 that we mailed the ballot in; and when it comes back in the
13 I.D. envelope, you'd be able to use that barcode to identify
14 the voter, correct?

15 A. I believe that's right.

16 Q. Let me ask you -- we haven't really talked about the
17 I.D. field. And by I.D., I'm not referring to birth date, but
18 either the social security number, driver's license, or that
19 third category of some form of physical I.D. that is presented.

20 With regard to -- and let's talk about -- I suppose
21 either absentee or -- just treat absentees and provisionals
22 together.

23 That I.D. requirement applies to both types of voters,
24 correct?

25 A. Yes.

1 Q. And in the absence of that -- one of those forms of
2 I.D., are you still able to identify from the rest of the
3 information that you have the voter and whether they're a
4 registered qualified elector?

5 A. We would typically be able to do that, yes.

6 Q. So can you think of what purpose -- let's start with the
7 date of birth. Can you think of what purpose the date of birth
8 requirement fulfills?

9 A. Honestly, it doesn't add to the ability to determine
10 whether or not it's a valid voter's ballot.

11 Q. And what about the I.D. requirement?

12 A. We're getting into an argument, I suppose, with another
13 but, no, I've never thought that the I.D. requirement was
14 necessary. We operated for decades on the basis of a voter's
15 signature, and that's still the best form of identification.

16 MR. CONOVER: Objection, Your Honor.

17 THE COURT: Basis?

18 MR. CONOVER: Identification is not an issue in this
19 case.

20 THE COURT: Well --

21 MR. CONOVER: Sidebar?

22 THE COURT: No.

23 Overruled. I believe that the -- the testimony is
24 relevant, and so I'm going to overrule it.

25 MR. CONOVER: Thank you, Your Honor.

1 THE COURT: Mr. Burke, as the chairman of the Hamilton
2 County Board of Elections, are you aware of any study or data
3 compilation undertaken by the Secretary to determine whether
4 either the provisional ballots or the absentee ballots were
5 subject to fraud?

6 THE WITNESS: I am not aware of any such study,
7 Your Honor.

8 THE COURT: Do you know of the acceptance rate of
9 absentee ballots during the last election cycle?

10 THE WITNESS: Your Honor, it tends to vary, but at
11 least in Hamilton County we typically get between 85 and
12 90 percent acceptance.

13 THE COURT: What was the rejection rate? Would that
14 be then 10 to 15 percent respectively?

15 THE WITNESS: I think that's about right, Your Honor.
16 And, typically, the rejection is based on the fact that the
17 voter wasn't registered to vote, period.

18 THE COURT: If we use the last election as a guide,
19 Mr. Burke, how many provisional ballots were cast?

20 THE WITNESS: I can tell you from Tuesday's
21 election -- although, the staff would say, well, that's not an
22 entirely accurate count yet because we haven't even found them
23 all yet, but we anticipate that we'll have about 8000 to 8500
24 provisional ballots cast in Hamilton County in Tuesday's
25 election.

1 THE COURT: And that's what percentage of the overall
2 ballots cast?

3 THE WITNESS: Boy, we were over a quarter million
4 ballots cast in this election.

5 THE COURT: Same question with respect to absentee
6 ballots. What percentage of absentee ballots -- what was the
7 number, and then what was the percentage?

8 THE WITNESS: Off the top of my head -- and, actually,
9 I -- I could almost get the number out of what I've gotten on
10 the pew in the back. We've not rejected any absentee ballots
11 yet. And, frankly, we don't reject very many of those. That's
12 typically not an issue. We had in the primary election, as I
13 recall, twenty-five to thirty thousand absentee ballots, early
14 vote ballots.

15 THE COURT: Out of a quarter of a million?

16 THE WITNESS: Yes, sir.

17 THE COURT: So that's about 10 percent?

18 THE WITNESS: I think that's about right, Your Honor.

19 THE COURT: Is that roughly what the percentage was
20 for the last election before the primary election?

21 THE WITNESS: No. In the General Elections in the
22 gubernatorial election, and in the presidential elections,
23 we -- the State is still sending out applications to all
24 registered voters.

25 But to give you an example of what's happened, in 2008

1 we had over a hundred thousand people vote early. This year we
2 are dramatically below that because in 2008 we had sent out
3 early vote applications to every registered voter in Hamilton
4 County, and that helped us enormously. And it's certainly --
5 I'm glad that the State is mailing out the absentee ballot
6 applications for this November's election because it reduces
7 the lines at polling places, and that helps -- it helps the
8 voter and it helps the Board in getting the election done.

9 THE COURT: If we look at the last -- let's say the
10 2012 presidential election.

11 THE WITNESS: Yes, sir.

12 THE COURT: Because I'm going to guess, Mr. Burke,
13 that the presidential elections have the greater -- greatest
14 voter turnout; is that right?

15 THE WITNESS: By far.

16 THE COURT: What was the percentage of absentee
17 ballots cast in the '12 presidential election?

18 THE WITNESS: Again, my --

19 THE COURT: I'm not going to hold you to these
20 numbers.

21 THE WITNESS: I've got a book sitting in my office
22 that can give you the exact number. I believe it was around
23 25 percent.

24 THE COURT: 25 percent?

25 THE WITNESS: Yes, sir.

1 THE COURT: That number was roughly what?

2 THE WITNESS: I think we probably had close to 400,000
3 ballots cast.

4 THE COURT: All right. Now, of the -- of that number
5 of absentee ballots, what percentage were rejected?

6 THE WITNESS: Absentee ballots, again, I think it
7 would be an infinitesimally small number of rejects.

8 THE COURT: Probably less than a thousand?

9 THE WITNESS: I would think so, yes, Your Honor.

10 THE COURT: Now with respect to provisional ballots --

11 THE WITNESS: Higher rejection rate.

12 THE COURT: What percentage of provisional ballots
13 were cast in the '12 election? Of the overall ballots cast,
14 what percentage were provisional?

15 THE WITNESS: Again, I think we probably had somewhere
16 between -- somewhere around 15,000 provisional ballots in '12.

17 THE COURT: 4 percent?

18 THE WITNESS: I think that's right; although, I'm a
19 lawyer not a mathematician for good reason.

20 THE COURT: Same here.

21 And of those 4000 that were cast, let's say, how many
22 were rejected of the 4000 provisional ballots that were cast?

23 THE WITNESS: 15,000 provisional ballots that were
24 cast.

25 THE COURT: 15,000 provisional ballots were cast --

1 THE WITNESS: I think we ran around 85 percent
2 approval on the provisional ballots. And most rejections
3 wouldn't have been in the hyper-technical reasons that we've
4 been talking about here, but there would be a significant
5 number of those.

6 And if I -- if I had known this question would have come
7 up, I think I could have gotten exact numbers for why in
8 various categories things were rejected, but the biggest reason
9 why a provisional is rejected is because the voter is not
10 registered.

11 THE COURT: All right. Please continue, Mr. McTigue.

12 MR. McTIGUE: Thank you, Your Honor.

13 BY MR. McTIGUE:

14 Q. The new law on provisionals, as you've already noted,
15 has added two fields, the birth date and address field;
16 correct?

17 A. Yes, sir.

18 Q. So now these are two more fields that the Board has to
19 spend time checking?

20 A. That's correct.

21 Q. Checking to see if they're filled in and then verifying
22 against their databases whether the information is correct?

23 A. That's correct.

24 Q. And also if the information is not filled in or is
25 incorrect after checking the voter registration database, the

1 Board has to spend more time considering the rejection?

2 A. Correct.

3 Q. Because in order to reject a provisional ballot, that
4 has to be done by a vote of the Board of Elections itself,
5 correct?

6 A. It has to be brought to us in a public meeting. It has
7 to be presented to us. It's put in a stack in front of us.

8 We do have a recommendation from the Board staff, but
9 the Board has to take that up and deal with it specifically.

10 Q. And with respect to absentees, even though previously
11 you had the fields for address and date of birth on the
12 envelope, as you've testified those were not treated as being
13 fatal errors if the error was either an omission or incorrect
14 information.

15 A. That's correct.

16 Q. But now the Board is actually required to validate the
17 information in those two fields and spend time and resources on
18 that, correct?

19 A. Correct.

20 Q. And if the Board finds in, well, any of the five fields
21 on the absentee, the Board has to send a Form 11S to the voter,
22 correct?

23 A. Yes, sir.

24 Q. So that takes additional time and resources in terms of
25 paper and postage?

1 A. It does.

2 Q. Let me ask you now about the voters who are -- these
3 would be provisional voters who are in the correct polling
4 place but the wrong precinct.

5 Their ballots can be counted, correct?

6 A. Absolutely.

7 Q. Okay. And the new law requires that the poll worker
8 fill out a form prescribed by the Secretary of State regarding
9 what we'll call the right polling place/wrong precinct voter,
10 correct?

11 A. If the poll worker identifies that, yes.

12 Q. And the law does not require, though, the poll workers
13 to fill out a form for the wrong location and wrong precinct
14 provisional voter.

15 A. Correct.

16 Q. Would it be useful to the Board of Elections to have
17 information on how the wrong polling place/wrong precinct
18 voters were assisted by the polling place officials?

19 A. Yes.

20 Q. Okay. Why would that be useful?

21 A. It would be helpful for us to know which poll workers
22 are doing a good job or not doing a good job. That's always a
23 helpful piece of information. We've learned the hard way that
24 we have to make sure our poll workers are fulfilling their
25 jobs.

1 Q. And in terms of being helpful to identify poll workers
2 who are not doing their job, you're referring to whether or not
3 the poll worker is referring the voter to the correct --

4 A. To the correct place.

5 Q. To the correct place?

6 A. Right.

7 Q. Another polling place?

8 A. Right.

9 Q. Now, can you think of any justification for -- from the
10 standpoint of speaking as an election official, chairman of the
11 board, can you think of any justification for allowing absentee
12 voters that have a problem with their envelope to come into the
13 Board of Elections and fix that for 7 days after but not
14 allowing provisional voters to do the same except for I.D.
15 issues?

16 A. No.

17 Q. So you cannot think of any reason to treat the absentee
18 voter and the provisional voter who have the exact same issue,
19 say, with their date of birth or with their -- with their
20 signature, you can't think of any reason for treating them
21 differently?

22 MR. CONOVER: Objection, Your Honor.

23 THE COURT: Sustained.

24 BY MR. McTIGUE:

25 Q. Lastly, let me ask you about homeless voters.

1 Homeless voters can register by using an address that is
2 not a standard address; in other words, they can register using
3 a description such as a park bench in a city park, correct?

4 A. That has always been our understanding. Our Board has
5 always said that, but I can't tell you of a single example of
6 that actually occurring on our voting rolls.

7 What we have a lot of is people who are registered to
8 vote from the homeless shelter they might most frequently go
9 to.

10 Q. But if you had, say, a voter -- a homeless voter who put
11 down their address as saying under -- you know, on the east
12 side of the river under the Main Street bridge --

13 A. If we ever had that, I'm satisfied that our Board staff
14 would figure out a way to properly record them at that
15 location.

16 Q. For purposes of registering them to vote?

17 A. Correct.

18 Q. And in terms of then the voter, say, voting by -- well,
19 let's say they came in to vote -- to early vote. How would
20 that be handled?

21 A. Again, I'm satisfied that our staff would figure out a
22 way to get that person voted.

23 Q. Okay.

24 A. I can't tell you that we've had that happen. I can tell
25 you one thing that we do have happen now; we've had a number of

1 people whose buildings where they are registered in have been
2 torn down so we know they don't live there any longer.

3 If they attempt to vote from that address, it's
4 certainly possible that their vote could be challenged because
5 we've had some folks who have been pretty aggressive at
6 insisting that since that building no longer exists, they can't
7 possibly be living there and that can't be their place of voter
8 registration. So those voters are challenged if they attempt
9 to vote using that address. They are not removed from our
10 rolls because we recognize they have the ability to go to the
11 polling place in the precinct they now live in and vote a valid
12 provisional ballot.

13 Q. And how would the -- in the case of a -- again, a voter
14 that is a homeless voter that registers at an address other
15 than a house and a number and a street, how would that person
16 be entered into the registration system?

17 A. Because I don't think we've actually had to do that, I
18 can't give you a direct answer to that question other than I
19 can tell you that our Board on a bipartisan basis and our Board
20 staff have been instructed that if you have a homeless person
21 and they want to register from an untraditional location, we
22 will register them there.

23 MR. McTIGUE: Thank you very much.

24 No further questions, Your Honor.

25 THE COURT: Thank you, Mr. McTigue.

1 Mr. Conover, please proceed.

2 DIRECT EXAMINATION

3 BY MR. CONOVER:

4 Q. Good afternoon, Mr. Burke. I think we met once before
5 but, for the record, my name is Brodi Conover, and I'm from the
6 Ohio Attorney General's office and in this case I represent the
7 defendants the Secretary of State and the State of Ohio.

8 Mr. McTigue walked you through a little bit of your
9 background so I'm not going to do too much of that, but I just
10 want to confirm that you are --

11 THE COURT REPORTER: I'm sorry, Mr. Conover, I'm going
12 to have to ask you to slow down.

13 I just want to confirm --

14 BY MR. CONOVER:

15 Q. That you are the chairman of the Hamilton County Board
16 of Elections.

17 A. It's happened to me, too.

18 Yes.

19 Q. Yes, I remember from ODPA and the transcript.

20 And I believe you also said that you are a Democrat?

21 A. Yes.

22 Q. And, in fact, you're the chairman of the Hamilton County
23 Democratic Party, correct?

24 A. Yes.

25 Q. And can you describe the different types of hats that

1 you wear as chairman of the Hamilton County Board of Elections
2 and the Hamilton County Democratic party?

3 A. I'm not sure precisely what you mean. And I think we've
4 been through a little bit of this before but, obviously, as the
5 chair of the Board of Elections, as a member of the Board of
6 Elections, my principal obligation is to ensure that elections
7 in Hamilton County take place fairly and efficiently.

8 And I think my Republican counterpart, who is also on
9 our Board of Elections, would answer that question the same
10 way.

11 Q. So in your testimony here today, do you represent the
12 Hamilton County Board of Elections?

13 A. I am speaking on a personal basis today. I am not
14 attempting to speak on behalf of the four members of the Board
15 of Elections, no.

16 Q. And are you speaking on behalf of the Hamilton County
17 Democratic party?

18 A. I am not.

19 Q. Okay. I would like to talk a little bit about the
20 written testimony that Mr. McTigue showed you today, and the
21 first one I would like to bring up is Plaintiffs' Exhibit 1214.

22 A. Yes, sir.

23 Q. And I believe this was your testimony on Senate Bill
24 216?

25 A. Yes, sir.

1 Q. And was this testimony submitted on behalf of the
2 Hamilton County Board of Elections?

3 A. No. And if there was one thing I would do differently
4 with regard to this, it would not be on Board of Elections'
5 stationary. It would have been on my own stationary if I had
6 that to do over again.

7 Q. Thank you.

8 Can you tell me why you chose to use Board of Elections'
9 letterhead?

10 A. Probably because I didn't think very much about doing it
11 in advance. I just did it.

12 Q. And when you submitted this letter, this written
13 testimony, excuse me, who is -- you were the chair of the
14 Hamilton County Board of Elections, correct?

15 A. In 2014, yes.

16 Q. And who is Mr. Triantafilou?

17 A. He is another member of the Board of Elections who
18 happens to be the chair of the Hamilton County Republican
19 Party.

20 Q. And who is Mr. Faux?

21 A. He is the other Democrat on the Board of Elections.

22 Q. And who is Mr. Gerhardt?

23 A. He is the other Republican on the Board of Elections.

24 Q. And were those three other members of the Hamilton
25 County Board of Elections aware that you submitted testimony in

1 support of --

2 A. Prior to me doing it, no.

3 Q. Can I finish my question?

4 A. I'm sorry. I apologize.

5 Q. Thank you.

6 Were those three members of the Hamilton County Board of
7 Elections aware that you submitted testimony against Senate
8 Bill 216?

9 A. No, not prior to me doing it.

10 Q. And were they aware you used Board of Elections'
11 letterhead?

12 A. No, not prior to me doing it.

13 Q. So again I'll ask, was this testimony on behalf of the
14 Hamilton County Board of Elections?

15 A. I think I already answered that question, and the answer
16 was no.

17 Q. Thank you.

18 And now I would like to move a little bit into kind of
19 the voting -- I'm going to say voting apparatus at the Hamilton
20 County Board. What is the difference between an absentee
21 ballot and a provisional ballot?

22 A. The absentee ballot today should probably be called an
23 early vote ballot. Absentee applies to the laws that used to
24 exist a long time ago when you had to be able to establish,
25 typically, you were going to be out of the county on Election

1 Day in order to vote. We still use that term, but today it
2 applies to voters who vote in the roughly 30-day period prior
3 to election either by mail or by coming to the Board of
4 Elections and casting an early ballot there. They are also
5 treated, in your generic, as being an absentee voter.

6 Q. And what is a provisional voter?

7 A. A provisional voter is a voter who goes to a polling
8 place on Election Day. They are not in the voter rolls for
9 that precinct, or in some cases the poll worker is unable to
10 find them in there. They are still entitled to vote in that
11 precinct if they say their address is in that precinct. Or
12 even if they simply say I want to vote here, we have to allow
13 them to vote at that location. And they vote the same ballot
14 that a regular voter would vote but their ballot, instead of
15 being fed into our ballot reader, it goes into a provisional
16 ballot envelope with additional information on it, and that
17 envelope is placed in a separate location in the ballot box.

18 Q. And is not being in the poll book the only reason
19 someone would vote a provisional ballot?

20 A. That would typically be it. I'm trying to think if
21 there may be other reasons. Conceivably, yes, a newly married
22 person or somebody who for other reasons has changed their
23 name, they may still be -- their former name may be in the
24 book, they're now using a new name. That could cause a
25 problem. They may have moved within a precinct. And while I

1 don't think they should be required to cast a provisional
2 ballot, the poll workers may require them to cast a provisional
3 ballot. Or if there are other questions.

4 Like, just Tuesday night, as you know we had a very
5 strange thing happen Tuesday night. We had closed the polls at
6 7:30 after having a very smooth Election Day, as opposed to
7 last year. And at 8:01 we had a directive from the Secretary
8 of State conveying an order from Judge Dlott telling us to keep
9 the polls open from 7:30 to 8:30. We had to scramble. We did
10 have 65 people that we've identified so far who came to a
11 polling place in that 29-minute period of time that we knew
12 about an order, and those folks were able to vote. They were
13 required to vote a provisional. Whether they were in the book
14 or not, at that time they had to vote a provisional envelope,
15 and that envelope had the additional information on it that
16 they voted after 7:30.

17 So there are a variety of different reasons why people
18 may vote a provisional ballot.

19 Q. But those all hinge on -- and a voter's eligibility is
20 in question, correct?

21 A. Yes.

22 My hesitancy was those folks who voted late on Tuesday,
23 for example, they were eligible voters, there's no question
24 about that. It's just they didn't -- the question remaining is
25 are they eligible to cast a vote after 7:30?

1 Q. I think Tuesday may have been a unique situation.

2 A. I think it was.

3 Q. So I was just meaning in a normal context --

4 A. To the extent there is a normal context for

5 provisionals, yes. Typically, the question is whether or not

6 this is a validly registered voter who lives in that precinct.

7 Q. Thank you.

8 Is Hamilton County a DRE county? And do you know what I

9 mean by DRE?

10 A. We are a paper ballot county.

11 Q. Thank you.

12 And does Hamilton County consolidate their poll books?

13 A. We have separate -- we still have separate paper poll

14 books for each precinct. So on Tuesday, for example, there

15 were paper poll books in each precinct, but we are now using

16 E-Poll books, and those have access to the entire voter

17 registration list for Hamilton County.

18 Q. I'm sorry. So my question was do you consolidate your

19 poll books, and your answer is by E-Poll books you do

20 consolidate?

21 A. Correct.

22 Q. Thank you.

23 Now, I would like to talk a little bit about the

24 absentee process at the Board of Elections. Can you describe

25 all the steps that the Board staff takes when they process an

1 absentee ballot application form?

2 A. I'm probably not the right person to ask the details of
3 how that's handled. I can give you my best understanding of
4 it. I've never had to do that myself.

5 Q. That's fine. If you've never done it, then I don't know
6 it would make sense.

7 A. Okay. Thank you.

8 Q. So you don't know what information Board staff uses to
9 look up voters in the voter registration database?

10 A. I mean, they use our voter registration database, and
11 we've had them do that any number of times right in front of
12 the Board of Elections in open meetings when we've had to for
13 various reasons.

14 Q. I just meant when the Board staff receives a voter's
15 absentee application, you do not know the specific information
16 that they enter into your database to ascertain the identity --

17 A. No, I wouldn't be comfortable giving you the details of
18 that.

19 Q. Thank you.

20 Similarly, with the provisional process, you don't know
21 how the Board staff process takes -- the specific steps that
22 they take to identify a provisional voter?

23 A. I can give you a pretty good idea of that because
24 that's, again, a process that sometimes we've had to do right
25 in the middle of Board meetings.

1 Q. Okay. If you could please explain.

2 A. And it's taking the information that is on that poll
3 envelope, putting it in our computer system and matching up
4 what can be matched up, or going to the Ohio voter registration
5 database where a voter has indicated that they used to be
6 registered in Montgomery County and they now live in Hamilton
7 County.

8 Q. So I believe on your cross with Mr. McTigue, you said
9 that you will absolutely not need date of birth to identify a
10 voter; is that correct?

11 A. I can't think of a time that we would need the date of
12 birth.

13 Q. Again, when a Board staff member is processing a
14 provisional ballot, are you aware if they use date of birth or
15 not?

16 A. I know that that information is available to match to
17 our records. I don't think it's necessary to do that if we
18 have a voter's signature that matches our records.

19 Q. Can you search a voter in the voter registration
20 database by signature?

21 A. We can search the voter's name, and it brings up the
22 voter's signature.

23 Q. But you said that signature is the most important thing
24 in identifying a voter. Can you search the database by
25 signature?

1 A. We could -- no.

2 Q. Okay.

3 A. They could --

4 Q. Do you know how a Board -- the Board staff verifies a
5 voter's address?

6 A. By matching it to our records.

7 I'm not sure what you mean by verifying the voter's
8 address.

9 Q. So do you know what the Geographic Information System
10 is?

11 A. Yes.

12 Q. And does the Board utilize the Geographic Information
13 System to verify a voter's address?

14 A. I do -- you mean to verify whether or not a particular
15 123 East 123rd Street is an address within precinct 3A? Is
16 that what you're asking?

17 Q. Yes, sir.

18 A. We have a system that allows us to determine whether or
19 not a particular address is within the address range in that
20 precinct.

21 Q. Okay. I'd also like to ask, does the Board's website --
22 let me start over.

23 Can you describe the Board's website that is made
24 available to absentee voters to check the status of their
25 ballot?

1 A. We -- you're right, we do have that information on our
2 website, and a voter can go into that to determine whether or
3 not their ballot has been received and processed -- has been
4 received.

5 Q. Do you know how many voters in Hamilton County have the
6 same name?

7 A. Do not.

8 Q. Do any?

9 A. Sure.

10 Q. And do you know how many voters in Hamilton County have
11 the same last four of their social security number?

12 A. Don't know.

13 Q. Do any?

14 A. Probably.

15 Q. And Mr. McTigue asked you a little bit about homeless
16 voters. Do homeless individuals in Hamilton County have the
17 right to vote?

18 A. Absolutely.

19 Q. And I don't want to walk through the specifics of how
20 they register but, again, I believe on your direct -- or your
21 cross, you said that you -- the Board staff would do anything
22 they could to register a homeless voter.

23 A. Yes, sir.

24 Q. And that the Board staff would do anything that they
25 could to count a homeless voter's ballot.

1 A. Yes.

2 Q. Are you required to have a telephone number to register
3 to vote?

4 A. No.

5 Q. And does the Hamilton County Board have current
6 telephone numbers for all registered voters?

7 A. No.

8 Q. In fact, the Hamilton County --

9 A. We don't have birthdays for all registered voters.

10 Q. And, in fact, the Hamilton County Board of Elections
11 does not record a voter's telephone number or e-mail address in
12 the voter registration database; is that correct?

13 A. That's correct.

14 Q. Are you familiar with the Ohio Association of Election
15 Officials?

16 A. I am.

17 Q. And are you aware that in support of the challenged
18 provision not -- excuse me. Let me strike that.

19 Are you familiar with the recommendations from the OAEI
20 that recommended the five identifiers for absentee ballots?

21 A. I am familiar with they have made several
22 recommendations with which I didn't agree, but yes.

23 Q. And then it's a little out of order so I apologize, but
24 let's go back to the provisional ballot.

25 What purpose does a provisional ballot have for a

1 non-registered individual?

2 A. For a non-registered individual?

3 Q. Yeah. So you said that the most frequent reason for
4 rejecting a provisional ballot is that an individual isn't
5 registered.

6 A. Correct.

7 Q. And does a provisional ballot actually register --

8 A. Oh, yes, it does.

9 Q. Thank you.

10 And then, finally, I would like to talk a little bit
11 about --

12 A. The provisional ballot doesn't. The -- I get what you
13 mean but, yes, once the voter fills out a provisional envelope,
14 it constitutes a voter registration for them if they hadn't
15 previously been registered.

16 Q. And why is that?

17 A. What do you mean why is that?

18 Q. How can it act as a registration for a non-registered
19 individual?

20 A. Because it provides all of the information that would
21 otherwise be necessary to register to vote if you had done it
22 30 days in advance of the election.

23 Q. And the previous version of the provisional affirmation
24 statement did not do that?

25 A. I'm trying to remember. I'll accept that. I -- I don't

1 remember off the top of my head.

2 Q. Thank you.

3 How many full-time staff members does the Hamilton
4 County Board of Elections have?

5 A. I believe it's 44 right now.

6 Q. Thank you.

7 And then, finally, again I would like to talk a little
8 bit about the Board's review of absentee and provisional
9 ballots.

10 How are the ballots presented to the staff or to the
11 Board by the staff?

12 A. Provisionals?

13 Q. Yes.

14 A. They will -- they have started now, for example, going
15 through the 8500 or so provisionals and organizing them in a
16 manner that will allow them to review what's on the outside of
17 the envelopes, and they will begin to make determinations as to
18 which of those, based on the information provided, have been
19 cast by validly registered voters and are entitled to be
20 counted. They will set aside those which they, on a bipartisan
21 basis, determine for one reason or another are questionable,
22 and those will continue to be reviewed until ultimately a
23 determination is made by a bipartisan team that for one reason
24 or another they're prepared to recommend they not be counted.

25 Those then go to our director and deputy director who

1 have to review them hopefully to come to the same conclusion,
2 and they will then present those in a public meeting of the
3 Hamilton County Board of Elections in groups; all of these
4 ballots are to be approved, these ballots are not to be
5 approved because they're not registered. These ballots are not
6 to be approved because the signatures do not match our
7 registrations. These ballots don't get approved because we --
8 for whatever reason it may be.

9 Q. So they -- those provisional ballots that are
10 recommended to be not accepted, they go through three levels of
11 bipartisan review before they get to the Board of Elections?

12 A. They go through two levels of bipartisan review
13 typically before they go -- come to the Board.

14 Q. Okay. Thank you.

15 And then what information is presented to the Board with
16 those recommendations?

17 A. The ballots -- the provisional ballot envelopes
18 containing the ballots. And that's another reason why on
19 occasion this envelope gets rejected, is because you can see
20 through the holes there's no ballot in it, there's nothing to
21 be counted. For whatever reason that may be, that happens.

22 But the envelopes, almost all of which contain ballots,
23 are literally put on the table in front of us and we go through
24 those groupings one at a time and, in many cases, go through
25 each envelope one at a time to determine whether or not we're

1 going to accept the staff recommendation.

2 Q. So for every ballot that is rejected or accepted, you
3 have the opportunity to review?

4 A. Yes, sir. And, again, every ballot envelope.

5 Q. I'm sorry, yes, ballot envelope.

6 And you just said that in most cases you do do that
7 individual envelope review?

8 A. No. To be clear, if we've got a whole stack of
9 envelopes containing ballots that our Board staff have
10 unanimously determined these people are not registered anywhere
11 in the State of Ohio, we don't go through each of those one at
12 a time. We would typically accept staff's recommendation
13 unless there was some question raised about it; I know this
14 person. I know that they are living at that address and are
15 registered.

16 But, typically, we wouldn't go through those one at a
17 time.

18 Q. Is it fair to say you typically accept the staff's
19 recommendation?

20 A. I would think 99.9 percent of the time we're going to
21 accept the staff's recommendation.

22 Q. And this may go without saying, but who ultimately
23 accepts or rejects provisional ballots?

24 A. The Board of Elections.

25 Q. And that is a bipartisan process?

1 A. Correct.

2 Q. And can you explain what that means?

3 A. It's bipartisan to the extent that the Board is composed
4 of two Democrats and two Republicans, and collectively we are a
5 bipartisan group.

6 Q. I guess what I mean by that is the composition is that
7 there's four Board of Elections members, correct?

8 A. Correct.

9 Q. Two Republicans and two Democrats?

10 A. Correct.

11 Q. In order to pass or accept the ballot, it would have to
12 be three members?

13 A. Correct.

14 Q. At least three members.

15 A. Correct.

16 Q. Okay. Thank you.

17 A. Or two members and the Secretary of State.

18 Q. Thank you.

19 THE COURT: Mr. Conover, you do recognize that you
20 don't have him as upon cross; am I correct?

21 MR. CONOVER: I didn't hear an objection, Your Honor.

22 THE COURT: You just did.

23 MR. CONOVER: Well, then, can we have a sidebar,
24 please?

25 THE COURT: No. You can continue. But he's as upon

1 direct. He is the chairman of the Hamilton County Board of
2 Elections and, as I previously ruled on the 611, he is not your
3 witness as upon cross.

4 MR. CONOVER: Thank you, Your Honor.

5 THE COURT: I knew that you would know what that
6 meant.

7 MR. CONOVER: Yes, Your Honor.

8 BY MR. CONOVER:

9 Q. What is your goal, Mr. Burke, as to when it comes to the
10 ballots that are cast in any given election in Hamilton County?

11 A. My personal goal?

12 Q. As a --

13 A. As a Board member is to see that all ballots that were
14 cast by properly registered voters get counted.

15 MR. CONOVER: I have no further questions, Your Honor.

16 THE COURT: Thank you, Mr. Conover.

17 Any recross, Mr. McTigue?

18 MR. McTIGUE: Yes, Your Honor.

19 RE CROSS-EXAMINATION

20 BY MR. McTIGUE:

21 Q. And, Mr. Burke, are you a member of the OAE0?

22 A. I am.

23 Q. Okay. Do you consider the OAE0 to adequately represent
24 the interests of large counties?

25 A. No.

1 Q. Okay. Would you explain that?

2 A. The OAE0 -- look, they are well-meaning people, but it
3 tends to be dominated by smaller rural counties with much
4 smaller staffs and much smaller voting populations than exist
5 in the larger counties.

6 Q. And the OAE0 voting rights are not proportional based on
7 size of the county, correct? In other words, each -- each --
8 each person gets one vote?

9 A. Correct.

10 Q. Now, you were also asked some questions regarding using
11 the provisional affirmation form to register a voter; in other
12 words, someone who is not registered at all, they can -- under
13 the new law this form can be used to register them and add them
14 to the rolls for future elections, correct?

15 A. Yes, sir.

16 Q. They would have also cast the provisional ballot, but
17 that will not be counted, correct?

18 A. Correct.

19 Q. Okay. Now, can you think of any reason -- well, let me
20 step back for a second.

21 So that's a useful function of this form, to register
22 people who aren't registered, correct?

23 A. It is.

24 Q. It's the same thing as filling out a regular
25 registration form?

1 A. Correct.

2 Q. And can you think of any reason to -- any reason based
3 on the fact that this form can be used to register new voters
4 as a legitimate justification for jeopardizing or
5 disenfranchising people who are already qualified electors
6 because they did not properly fill out date of birth or an
7 I.D.?

8 MR. CONOVER: Objection, Your Honor.

9 THE COURT: Basis, Mr. Conover?

10 MR. CONOVER: Form.

11 THE COURT: Read the question back. I want to see if
12 that's the question that you meant to ask, Mr. McTigue, and I
13 want to see if you, Mr. Burke, understand the question.

14 (Question read back.)

15 THE COURT: Is that the question that you meant to ask
16 in the form in which you meant to ask it, Mr. McTigue?

17 MR. MCTIGUE: Yes, Your Honor.

18 THE COURT: Okay. Did you understand it, Mr. Burke?

19 THE WITNESS: I believe I did, Your Honor.

20 THE COURT: All right. I'm going to overrule the
21 objection. It was confusing to me, too, Mr. Conover. But if
22 the witness understood it, it's not substantively improper. I
23 will allow it to stand.

24 MR. CONOVER: Thank you, Your Honor.

25 THE WITNESS: No.

1 BY MR. McTIGUE:

2 Q. You were asked if it's possible to search the voter
3 registration database based on the voter's signature, and I
4 think you said no, it's not possible. Do you recall that?

5 A. I do recall that.

6 Q. Okay.

7 A. And I recall not being allowed to finish what I would
8 have liked to have said.

9 Q. Yes. So I now want to ask you what else you wanted to
10 say?

11 A. My point was we can put the voter's name in; and even if
12 there are multiple people with the same name, we can bring up
13 each one of their signatures on our system, and we can then
14 attempt to match signatures.

15 Q. And to be clear, what we're talking about is bringing it
16 up on the computer screen, a digital image of their
17 registration signature?

18 A. Correct. And, frankly, then if we have to -- and we've
19 had to do this -- we send somebody down in the basement to go
20 get their voter registration card and look at the original
21 signature if there's any reason why we're having a difficult
22 time seeing it on the screen.

23 Q. In fact, the signature on the screen is commonly the
24 most recent sample of that person's signature, such as the last
25 time they signed a poll book?

1 A. Typically, that's correct.

2 Q. All right. And so if there was a difference, you could
3 basically go back through the paper record to go to the
4 original record if you needed to?

5 A. Correct.

6 Q. Now, your testimony regarding the -- or, I'm sorry, your
7 testimony today regarding the testimony you gave to the General
8 Assembly, the written testimony, that was -- you were acting on
9 your own behalf, correct?

10 A. Correct.

11 Q. But your -- the content of what you had to say was
12 informed from your experiences as a member of the Board of
13 Elections?

14 A. They were -- they were informed from my experiences,
15 frankly, from having been in politics now for a very long time,
16 from having been on the Board of Elections for a very long
17 time, from having served as an international supervisor of
18 elections in Bosnia and done election training in Slovakia.
19 From all of those things, that's given me reason to believe
20 what I believe about voting rights, and that's what I was
21 trying to convey in shorthand form in these two letters.

22 Q. And would that be a fair description of your -- the
23 testimony today in this courtroom, that it's based on your
24 experiences on the Board?

25 A. My experiences on the Board. And, as I say, beyond

1 being on the Board but, you know, spending lots of times going
2 door-to-door talking to voters, that's part of the experience
3 which forms my opinions.

4 Q. You were also asked the question about whether people --
5 some people in Hamilton County would have the same name. Do
6 you remember that?

7 A. Yes, sir.

8 Q. And you were also asked if it's possible that some
9 people in Hamilton County might have the same last four digits
10 of their social security number.

11 A. Yes, sir.

12 Q. Okay. So assuming we had two voters with the exact same
13 name and the exact same last four digits of their social
14 security number who cast, let's say, absentee ballots, they
15 would be in your voter registration database with the same
16 numbers -- or the same last four digits, if that's what they
17 used when they registered, and they would be in the database
18 with the same last name, correct?

19 A. Correct. The one thing that wouldn't be the same is
20 their signature.

21 Q. Okay. Now, Hamilton County is -- do you know in terms
22 of the 88 counties where it falls in terms of the size
23 population-wise?

24 A. First of all, it's the best county.

25 Q. Okay. That was not my question, Mr. Burke.

1 A. I believe it's the third largest county in the State of
2 Ohio.

3 Q. Okay. And of the population, do you know what the
4 percentage of the population is that's African-American?

5 MR. CONOVER: Objection, Your Honor.

6 THE COURT: Basis, Mr. Conover?

7 MR. CONOVER: Outside the scope.

8 THE COURT: Sustained.

9 BY MR. McTIGUE:

10 Q. Mr. Burke, based on your experience on the Board of
11 Elections, has the implementation of the mandatory field
12 requirements for absentee voters and provisional voters
13 resulted in disenfranchising otherwise qualified electors?

14 A. I believe it has.

15 MR. McTIGUE: No further questions.

16 THE COURT: Anything further, from you, Mr. Conover?

17 MR. CONOVER: Nothing further, Your Honor.

18 THE COURT: Thank you, Mr. Conover.

19 Mr. Burke, thank you very much, sir. You may be
20 excused.

21 THE WITNESS: Thank you, Your Honor. I appreciate it.

22 THE COURT: It's 4:00 o'clock, ladies and gentlemen.
23 We're going to take our afternoon recess until 4:10, then we'll
24 resume with -- who is the next witness?

25 MR. CONOVER: Zachary West.

1 THE COURT: With Mr. West.

2 (Thereupon, a recess was taken.)

3 THE COURT: Mr. McTigue, your next witness.

4 MR. McTIGUE: I call Zachary West.

5 THE COURT: Mr. West, please come forward and be
6 sworn.

7 - - -

8 ZACHARY WEST

9 AFTER HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

10 DIRECT EXAMINATION

11 BY MR. McTIGUE:

12 Q. Could you state your full name?

13 A. Nathaniel Zachary West.

14 Q. And how do you spell Zachary?

15 A. Z-A-C-H-A-R-Y.

16 Q. Okay. Mr. West, where are you employed?

17 A. I am the general counsel and director of operations for
18 the Ohio Democratic Party.

19 Q. And how long have you held that position?

20 A. Since February of 2014.

21 Q. And, I'm sorry, that was general counsel and --

22 A. Director of operations.

23 Q. Thank you.

24 Now, were you previously employed by the Ohio Democratic
25 Party?

1 A. Off and on since 2004 as a field organizer or scheduler
2 for surrogate events at various times.

3 Q. Now, as I ask you questions today, I just want to be
4 clear -- since you apparently wear two hats at the party, one
5 as general counsel and one as director of operations -- that I
6 am not asking you any questions that would require you to
7 divulge any attorney/client privileged information.

8 A. Okay.

9 Q. Okay?

10 But, you know, let's lay out for the Court in some
11 general way what the difference between those two hats are.

12 A. General counsel would be chief in-house legal counsel so
13 it's the standard in-house legal work, employment law advice,
14 tax law advice, review of contracts and leases.

15 Director of operations in this sense would be in charge
16 of budgeting, in charge of expenditures, handling any state or
17 federal campaign, and compliance issues.

18 Q. And in your capacity as director of operations, do you
19 have any involvement or responsibilities with respect to the
20 Ohio Democratic Party's voter education programs?

21 A. Yes. I review the materials before they're sent out to
22 ensure they have the proper disclaimer. I'm in charge of
23 determining whether they are federal or non-federal activity
24 and how to pay for them and how to report them.

25 In my general counsel role I also review it to make sure

1 the information contained is accurate and legal.

2 Q. Now, I may have gotten ahead of myself there, but
3 what -- well, does the Ohio Democratic Party conduct voter
4 education programs?

5 A. Yes.

6 Q. Can you describe based on your personal knowledge what
7 those programs are?

8 A. Sure.

9 We do paid and volunteer phone calls to registered
10 Democrats and independents who we think are likely to vote
11 Democrat based on a variety of factors encouraging them to
12 vote, helping them determine what they need to take to the
13 polls with them when they vote in terms of identification and
14 things, and also explain to them what they need to do if
15 they're told to vote a provisional ballot. We also do a mail
16 program aimed at those same voters, and we go door-to-door in
17 high Democratic turnout neighborhoods providing the same
18 information.

19 Q. And you mentioned mail programs to voters. Is this mail
20 program specifically related to voting requirements?

21 A. Yes. We -- we do send out what is called a Voter Bill
22 of Rights in presidential years that includes information on
23 the types of I.D. you would need to take to the polls with you,
24 where to go to the polls -- where your voting location is,
25 rather, hours that the polling locations are opened, that sort

1 of thing.

2 Q. Now, these activities on voter education, do they --
3 does the degree of activity fluctuate from year to year?

4 A. Yes. Depending on the budget we have, the races on the
5 ballot and a number of other factors, it can vary greatly from
6 one year to the next.

7 Q. And in what years would you say you have the highest
8 amount of voter education activity?

9 A. Presidential election years 2008, 2012, 2016, 2020, et
10 cetera.

11 Q. Okay. And why is that?

12 A. Those are the years that have the highest voter turnout.
13 A lot of people will only vote in presidential years and then
14 not vote in midterms or odd numbered years, and people tend
15 to -- if they're not already registered, you tend to have the
16 most new registrants in presidential election years.

17 Q. And is the Ohio Democratic Party conducting voter
18 education programs for this year, 2016?

19 A. We will be, yes.

20 Q. Okay. Did you conduct any such programs in connection
21 with the primary that we had this week?

22 A. Yes. In addition to our voter education efforts, we
23 also do a voter protection effort which would be placing
24 people -- what are called -- I think they're still called
25 challenges under Ohio law; although, they can't actually make

1 challenges at the polls anymore. But we certify people in
2 polling locations and Boards of Election to serve as observers
3 on Election Day, and we did that in 15 counties in the primary,
4 I believe.

5 Q. And how do you distinguish between voter education and
6 voter protection?

7 A. Voter education would be what occurs before Election
8 Day. It would be in the days and weeks and months leading up
9 to the election where we are educating people on what to take
10 with them or what to do once they get there, where to go, when
11 to go, et cetera.

12 Voter protection would be once they're there and they
13 have questions about they're telling me to vote a provisional
14 ballot or something along those lines, you know, I'm not
15 registered here, what do I do; once they're at the polls, I
16 would say it becomes voter protection rather than voter
17 education.

18 Q. With regard to voter protection, you mentioned one
19 component; that is, placing observers at Boards of Election
20 and/or polls?

21 A. Uh-huh, yes.

22 Q. Okay. Are there other aspects of the voter protection
23 program?

24 A. Yes. We also run a hotline where people can call in and
25 report problems at their polling place. We have regional what

1 are called boiler rooms, as well as statewide boiler rooms,
2 where we have teams of attorneys both paid and volunteer who
3 can then call Board of Elections and report, you know, we're
4 seeing a lot of provisionals at this location, we think that
5 your staff might need to be retrained, or various other issues
6 that might pop up on Election Day, power outages at the polls,
7 that sort of thing.

8 Q. And in terms of voter education activities, I think you
9 mentioned mailings. Are there other kinds of voter education
10 activities that the party has conducted?

11 A. Yes. Paid and volunteer phone banks targeting
12 registered Democrats where we have phone numbers for them,
13 canvases by paid and volunteers -- paid staff and volunteers in
14 neighborhoods where high percentages are registered Democrats
15 or that are likely to vote for Democratic candidates in the
16 fall.

17 Q. And with regard to these phone banks, are those -- those
18 phone banks, are they aimed at voter education or voter
19 turnout, or both?

20 A. They're aimed at both. Voter education is a part of
21 turnout, and turnout is a part of voter education. But,
22 really, it's very hard to separate the two. And I would point
23 out that the Federal Elections Commission actually treats them
24 interchangeably as well in terms of how we have to pay for
25 them.

1 Q. And does the party have plans to conduct voter
2 protection activities this year?

3 A. Yes.

4 Q. Now, has the party at this time decided what the
5 specific voter protection and voter education activities will
6 be related to the general election?

7 A. We have not yet. We have been waiting until we have a
8 nominee to figure it out because much of our strategy will be
9 based on who the nominee is. Now that it's clear it's Hilary
10 Clinton, we've begun having those plans. We have been planning
11 in a general sense since at least December of 2015 in terms of
12 just the generic here is where we plan on focusing, but
13 specifics would have to wait until we get a nominee.

14 Q. And how many members are there of the Ohio Democratic
15 Party?

16 A. Ohio defines membership in a political party by what
17 ballot you voted in the last partisan primary election. My
18 understanding is that the unofficial turnout for the Democratic
19 primary held on Tuesday was roughly 1.2 million so it would
20 probably be around 1.2 million members as of today.

21 Q. And, if you know, how many contributors who are
22 residents of the State of Ohio are contributing contributions
23 to the Ohio Democratic Party?

24 A. I do not know the number of contributors off the top of
25 my head.

1 Q. But those would be reflected on campaign finance
2 reports?

3 A. Yeah, they would be either on our reports that we file
4 with the Secretary of State or the Federal Elections Committee.

5 Q. And both those agencies' reports are public, correct?

6 A. Yes, you can see them online.

7 Q. Okay. Now, in terms of Ohio Democratic Party members,
8 do any of the members vote by absentee?

9 A. Yes. I don't know the number off the top of my head,
10 but I know some do -- I vote early in-person which is still
11 technically absentee voting, so at least one that I know of.

12 Q. Okay. Is it -- is it fair to say that there are many
13 more than that?

14 A. Yes.

15 Q. Okay. And how -- let me ask this:

16 Does the party conduct any activities aimed at promoting
17 voting early by mail or in-person?

18 A. Yes. That is a heavy part of our program Get Out the
19 Vote effort in the fall aimed at either encouraging people to
20 go to their -- usually the county Board of Elections and vote
21 early or vote on -- vote by mail which you can usually do
22 online now, request a ballot online, get it, fill it out and
23 mail it in.

24 Q. And does the party receive communications either by
25 phone or text or letter from absentee voters?

1 A. Phone calls, yes.

2 Q. And would that typically be when they're experiencing a
3 problem or when they're seeking information on how to vote?

4 MS. CARWILE: Objection; leading.

5 THE COURT: Sustained. Rephrase.

6 BY MR. McTIGUE:

7 Q. Generally, what would be prompting these calls?

8 A. Sometimes it's that they don't know how to request an
9 absentee ballot, they don't know where to go to vote.

10 Oftentimes, though, it's I requested a ballot and it
11 hasn't arrived yet, or I sent my ballot in and they haven't
12 received it yet. What do I do?

13 MS. CARWILE: Objection; hearsay.

14 THE COURT: Overruled. It's not being offered for its
15 truth.

16 MS. CARWILE: Thank you, Your Honor.

17 BY MR. McTIGUE:

18 Q. Mr. West, are some of the members of the Democratic
19 Party provisional voters?

20 A. Again, I don't have that number off the top of my head
21 but, yes, I do know some Democrats cast provisional ballots.

22 Q. How do you know that?

23 A. Again, we receive phone calls on Election Day that I
24 went to my polling place, I wasn't in the poll book and they
25 gave me this thing to fill out.

1 Q. Mr. West, are you aware that in this case, not the --
2 not what we're trying here today, but that in what's known as
3 the NEOCH case, that there is a consent decree that is still in
4 effect?

5 A. Yes.

6 Q. And are you familiar with that consent decree?

7 A. Generally, yes. I haven't read it specifically
8 recently, but I'm familiar with the general terms of it yes.

9 Q. Are you aware that the Ohio Democratic Party is a
10 signatory to that consent decree?

11 A. Yes.

12 Q. Now, are you familiar with Senate Bill 205?

13 A. Yes.

14 Q. And are you familiar with Senate Bill 216?

15 A. Yes.

16 Q. Now, do you see any connection between those bills and
17 the consent decree?

18 MS. CARWILE: Objection.

19 THE COURT: Basis, Ms. Carwile?

20 MS. CARWILE: Calls for a legal conclusion,
21 Your Honor.

22 THE COURT: Well, Mr. West is a lawyer; though, he's
23 not being called as an expert. But I think this is the type of
24 testimony that he's capable of giving so your objection is
25 noted, but overruled.

1 MS. CARWILE: Thank you, Your Honor.

2 THE COURT: You may answer, Mr. West.

3 THE WITNESS: Thank you, Your Honor.

4 My understanding is -- my recollection is the consent
5 decree, among other terms, stated that if a voter placed the
6 last four digits of their social security number, a provisional
7 voter included on their provisional ballot form, that they
8 would not be disenfranchised.

9 And that if a voter voted in what's right church/wrong
10 pew, which is where they went to the right polling location in
11 a multi-precinct location and voted in the wrong line, wrong
12 precinct, their vote would still be counted if it was poll
13 worker error.

14 My understanding of Senate Bill 205 is that it added two
15 additional fields to the provisional ballot form that had to be
16 filled out properly or else the ballot would be discarded
17 regardless of whether the voter put the last four of their
18 social or not.

19 My understanding of Senate Bill 216 is that it codified
20 into Ohio law a presumption that if a voter votes in the right
21 church/wrong pew, that it is their error and not poll worker
22 error. It creates a presumption of voter error instead of poll
23 worker error.

24 BY MR. McTIGUE:

25 Q. And with regard to Senate Bill 205 and the two fields

1 that you were mentioning, were you mentioning those in
2 connection with provisional votes?

3 A. Yes.

4 Q. Okay. Are you -- did you mean to say Senate Bill 216?

5 A. Yes, I'm sorry. I get those two confused sometimes.

6 Q. And so then can you explain in your own words whether
7 you see any connection between the consent decree and those two
8 bills?

9 A. I think we've just discussed 216.

10 205, I think, actually dealt with absentee voting, if I
11 remember correctly, and I believe it added the same two fields
12 to it as on the provisional envelope. But I may be mistaken
13 about that.

14 Q. Maybe I wasn't clear on my question, but can you explain
15 in your own words what impact you believe Senate Bill 216 may
16 have with respect to the consent decree?

17 A. I think it certainly undermines it. It eliminates at
18 least two of the protections contained in the consent decree by
19 adding the fields and creating the presumption of voter error
20 rather than poll worker error, both which were protections
21 contained within the original consent decree.

22 Q. Now, you just mentioned that Senate Bill 216 has these
23 additional fields, two additional fields.

24 A. Uh-huh.

25 Q. And what else does Senate Bill 216 do with respect to

1 provisional ballots?

2 A. I believe it shortens the cure period from 10 days to 7
3 days if there's an error with the identification field.

4 Q. And do you anticipate -- and by you, I mean the State
5 party. Does the State party anticipate that Senate Bill 216
6 will have any impact with regard to the party's voter education
7 and/or voter protection activities?

8 MS. CARWILE: Objection; leading.

9 THE COURT: Sustained.

10 Rephrase, Mr. McTigue.

11 BY MR. MCTIGUE:

12 Q. What impact, if any, does the party believe Senate Bill
13 216 will have on the party's activities?

14 A. We anticipate that it will create a substantial burden
15 on us this fall. We voters are creatures of habit. Once they
16 get used to doing something a certain way, they expect that to
17 continue to be the case. Every year we get calls from people
18 who are upset that their polling location has been changed,
19 sometimes calling and still complaining about a change that was
20 made three or four years in the past because they liked the
21 other location better and don't understand why they don't go
22 back to it, and that's on the basis where you go to vote.

23 When you begin changing forms and things -- which most
24 voters do not follow legislative sessions on ballot forms very
25 closely so they're not aware of changes -- we then have to go

1 back and, instead of registering new voters, educating new
2 voters, encouraging new voters to go vote, we have to spend
3 time and money going back and educating voters we've already
4 talked with about these new fields, these new changes to law
5 and what they need to do now.

6 Q. So does the party anticipate any increased dedication of
7 resources on voter education for this year?

8 MS. CARWILE: Objection; leading.

9 THE COURT: Overruled. You may answer.

10 THE WITNESS: Yes. And I should say it's not just the
11 amount of resources, but it's also the type of resources that
12 we have to spend on this that's problematic for the Democratic
13 Party.

14 BY MR. McTIGUE:

15 Q. Can you explain?

16 A. Yeah. We are governed by the Federal Elections
17 Commissions' regulations on how we pay for activities. In 2010
18 the Federal Elections Commission greatly broadened the
19 definition of federal election activity to include Get Out the
20 Vote activity, which would be anything that assists someone in
21 voting. Our voter education would be considered assisting
22 someone in voting, and so we now have to pay for all that with
23 what's called hard dollars or federal dollars which are subject
24 to strict contribution limits, are much harder to raise, and we
25 have a much smaller pool of than soft dollars.

1 So when we have to go back and educate voters, we're
2 having to spend a greater portion of a smaller pool of money
3 than we otherwise would.

4 Q. And does the party anticipate that it will have an
5 increased use of resources for its activities this year?

6 A. Yes. Since it's a presidential year, we will have more
7 people registering to vote, we'll have more people who plan on
8 voting, and we'll have to be educating all of them on changes
9 to the law, yes.

10 Q. And will that increase resources -- is it tied to any of
11 the requirements under the new law?

12 A. Yes. Like I said, we will have to go back and educate
13 voters we had previously educated that now you have to worry
14 about printing your name, you have to fill out these other
15 fields, et cetera. And also it's no longer right church/wrong
16 pew. It's now even if you're in the wrong precinct, the
17 presumption is you voted in the wrong location and it's your
18 fault even if the poll worker didn't tell you it was the wrong
19 location, et cetera, et cetera.

20 So we have to go back and tell people affirmatively that
21 they are in the right line when they go to their polling place.

22 Q. In terms of the Democratic Party's membership in Ohio,
23 does that membership include homeless voters?

24 A. I believe so, yes.

25 Q. And why do you believe that?

1 A. Obviously, it's going to be hard to locate them in our
2 voter file to canvas or to send mail to since they wouldn't
3 necessarily have a permanent address, but from speaking to
4 field staff, speaking to volunteers who have registered
5 homeless people leading up to the Democratic primary, I would
6 assume they then voted in the Democratic primary.

7 Q. And let's say a homeless person is registered as a
8 Democrat based on how they voted in the last primary and their
9 registration address is a homeless shelter.

10 A. Uh-huh.

11 Q. Does the party mail educational material to that
12 address?

13 A. If it's the registration address, we would pull our mail
14 list from the Secretary of State's voter file that they publish
15 on their website. So if that's the address on file with the
16 Secretary of State, that's where we would send the mail, yes.

17 MR. McTIGUE: May I have a moment, Your Honor?

18 THE COURT: Yes.

19 MR. McTIGUE: No further questions, Your Honor.

20 THE COURT: Ms. Carwile?

21 MS. CARWILE: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MS. CARWILE:

24 Q. Good afternoon, Mr. West. I don't think we've met
25 officially before. I'm Tiffany Carwile. I represent the

1 Secretary of State and the State of Ohio.

2 How are you doing this afternoon?

3 A. I'm doing all right. How are you?

4 Q. I'm doing all right. Thank you.

5 I just have a couple of questions -- more than a couple,
6 but some questions regarding your testimony with Mr. McTigue.

7 First I want to go over the voting education programs
8 that you had mentioned, and I just want to make sure I have
9 them all and we can go into them in a little bit more detail.

10 You had mentioned that you call people that are
11 registered as Democrats and independents; is that correct?

12 A. Yes.

13 Q. And you do a mail program?

14 A. Yes.

15 Q. A door-to-door program?

16 A. Yes.

17 Q. Is that the same as your canvassing?

18 A. Yeah, canvassing is a another name for door-to-door.

19 Q. You mentioned phone banks. Is that the same as the
20 calls you mentioned earlier?

21 A. Yes.

22 Q. Is the Voter Bill of Rights part of your mail program?

23 A. It would be part of the mail program, and we would also
24 post it on our website.

25 Q. Okay. Are there any other voter education programs that

1 the Ohio Democratic Party has done?

2 A. We post information on our website. We've -- I know in
3 the past we've posted things on social media. But phones,
4 canvassing and mail would be our main aspects.

5 Q. Okay. Great.

6 And then you mentioned that there was some Get Out the
7 Vote which sometimes you really can't separate from voter
8 education.

9 Is there anything different about your Get Out the Vote
10 efforts than your voter education efforts?

11 A. Yeah. I misspoke when I said that. I was referring to
12 budgeting purposes, really. But Get Out the Vote would be
13 telling people go vote. You know, here's where you go vote and
14 that sort of thing.

15 Voter education would be more what you need to take with
16 you to the polls in terms of, you know, photo I.D., utility
17 bill, paystub, something like that, the I.D. requirement, and
18 what to do if you get a provisional ballot, what you need to
19 fill in the fields, that sort of thing.

20 Q. Generally, what are your Get Out the Vote efforts?

21 A. There would be phone banks aimed at encouraging people
22 to go vote to make a plan for when and where they're going to
23 go vote, whether it's early vote or at their polling place,
24 what time of day, are you going to go with your spouse, your
25 significant other or whatever. That sort of thing.

1 Q. Anything else besides calling people?

2 A. We also do Get Out to Vote mailers. The election is
3 coming up, here's your sample ballot with a list of candidates
4 we would like them to vote for. We also do door-to-door
5 canvases as part of our Get Out the Vote effort.

6 Q. Anything else?

7 A. Again, social media. But those would be the three most
8 significant aspects, I would say, the phones, door-to-door and
9 mail program.

10 Q. So is it fair to say that it's the same type of program
11 or same type of activities as your voter education program,
12 just the substance is different?

13 A. The substance is different. We don't typically combine
14 education material with some of our Geo-TV, mail or in the same
15 phone calls. We'll typically make different calls for it just
16 to cut down on length.

17 Q. And going back to the voter education programs and your
18 telephone calls, did you do those telephone calls in 2008?

19 A. I believe so, yes.

20 Q. What about in 2012?

21 A. 2012, I know we did, yes.

22 Q. And did the OD -- sorry.

23 Q. Did the Ohio Democratic Party do the telephone calls for
24 the 2014 election?

25 A. To a much smaller extent, yes.

1 Q. Are there plans to do that in 2016?

2 A. Yes.

3 Q. Did you do those for the primary this past Tuesday?

4 A. Did we do?

5 Q. Sorry, voter education programs for -- through telephone
6 calls?

7 A. No, not to any extent that I'm aware of.

8 Q. And no matter what happens with this litigation, you
9 will do telephone calls with regard to voter education?

10 A. We will do telephone calls regardless; however, they
11 will not be the same type of telephone calls, nor will they
12 necessarily be aimed at the same audience.

13 Q. Okay. Same questions with your mail program, did you do
14 those in 2008?

15 A. Yeah. We do those every year.

16 Q. And you'll plan on doing those in 2016?

17 A. Yes.

18 Q. That will be the case no matter what happens with this
19 litigation?

20 A. Yes. But, again, it will be a different universe that
21 we're sending to, and the substance will be different.

22 Q. And your door-to-door canvassing, did you do that in
23 2012?

24 A. Again, we do that every year, yes.

25 Q. And you'll be doing that in 2016?

1 A. Yep.

2 Q. No matter what happens with this litigation?

3 A. Correct.

4 Q. And your website and the social media, did you do those
5 in 2012?

6 A. Yes.

7 Q. 2014?

8 A. Yes.

9 Q. And do you have plans to do those for 2016?

10 A. Yes.

11 Q. And that won't change -- that you will actually do that
12 will not change depending on this litigation?

13 A. No.

14 Q. And you mentioned that your voter education fluctuates,
15 the amount you spend on it or the time and the funds. Is that
16 an accurate statement?

17 A. Yes.

18 Q. And I think you mentioned -- I may not have written it
19 down correctly. You mentioned the money that you have
20 available, the candidates on the -- your Democratic ticket, and
21 then issues that are on the ballot. Is there any other reason
22 that I'm missing?

23 A. Also, the number of new voters versus current voters we
24 anticipate voting in the fall. Of course, seeing a large
25 number of registrants, we're obviously going to be doing more

1 of a voter education program for new voters. The impact this
2 litigation has is that it increases our voter education burden
3 because we have to go back and reeducate voters we had
4 previously educated due to the changes in the law.

5 Q. And you would do voter education on any change to the
6 election law; isn't that correct?

7 A. What do you mean by any change? I mean, if it's a
8 technical thing where the Board of Elections -- an internal
9 Board matter, we probably wouldn't bother voters with it or
10 something like that.

11 Q. Would any change to the absentee ballot procedures,
12 would you have to do voter education on that?

13 A. If it was an increased burden, yes.

14 Q. What about provisional balloting?

15 A. Again, if there was an increased burden or threshold on
16 the voter, yeah, we would have to educate them on that.

17 Q. You mentioned that you also do some voter protection
18 activities?

19 A. Yes.

20 Q. Is that accurate?

21 A. Yes.

22 Q. And I think I got down that you have observers on
23 Election Day?

24 A. Yes.

25 Q. That you have a hotline?

1 A. Yes.

2 Q. And that there's regional and statewide boiler rooms, I
3 think you said?

4 A. Yes.

5 Q. Anything else that you do with regard to voter
6 protection?

7 A. When possible we ask observers to note who is being
8 asked to vote provisionally. This is typically only in
9 presidential years because we have a much larger program then.

10 And once we learn -- once we identify who was asked to
11 vote provisionally, we will follow up in targeted races, narrow
12 races where the outcome might change depending on provisional
13 ballots. We will call as many of those voters as we can
14 identify and encourage them to reach out to the Board and make
15 sure that their ballot was counted. Or if they have an I.D.
16 issue, to cure the issue.

17 Q. And did you place observers in the 2012 election?

18 A. Yes.

19 Q. How about the 2014?

20 A. Yes.

21 Q. And do you have plans to place observers in the 2016
22 election?

23 A. Yes. We actually placed them in 15 Boards of Elections
24 on Tuesday.

25 Q. Okay. Great.

1 And you noted that you have the observers note
2 provisional voters, and you said you do that in just
3 presidential years?

4 A. That's typically when we have the resources to do it,
5 yes.

6 Q. And do you plan to do that in 2016?

7 A. Yes.

8 Q. And will that change depending on this litigation?

9 A. Probably not. That is more of a safety valve in case we
10 have narrow races. However, the number of people who have I.D.
11 issues probably will change which would lessen our burden.

12 Q. The I.D. -- the identification was in place prior to the
13 passage of 205 and 216; isn't that correct?

14 A. Yes.

15 Q. And you mentioned that you have a hotline?

16 A. Yes.

17 Q. And did you have that hotline in 2012?

18 A. Yes.

19 Q. Did you have that hotline in 2014?

20 A. Yes.

21 Q. Do you plan to have that in '16?

22 A. Yes.

23 Q. And that won't change based on this litigation?

24 A. No.

25 Q. And your regional and statewide boiler rooms, did you

1 have those in 2012?

2 A. Yes.

3 Q. 2014?

4 A. Yes.

5 Q. And did you have those in 2016?

6 A. We will, yes.

7 Q. Will you have them in 2016?

8 A. Yes.

9 Q. And that won't change depending on this litigation?

10 A. No.

11 Q. You mentioned that you -- that your party does a lot to
12 promote absentee voting; is that correct?

13 A. Yeah.

14 Q. And you focus -- that's a heavy part of your Get Out the
15 Vote effort?

16 A. Yes.

17 Q. And that is a strategy call for your party?

18 A. What do you mean by strategy call?

19 Q. To focus your efforts -- it's a strategy to focus your
20 efforts on absentee voting.

21 MR. McTIGUE: I'm going to object on a First Amendment
22 basis. When we get into what constitutes internal party
23 strategy, it's protected by the First Amendment.

24 THE COURT: Sidebar.

25 - - -

1 Thereupon, the following proceeding was held at sidebar out
2 of the hearing of the open courtroom:

3 THE COURT: Go ahead, Mr. McTigue.

4 MR. McTIGUE: Yes. There's First Amendment protection
5 for political parties and political association rights, mostly.
6 When you're talking about internal party strategies or
7 specifics and such a specific amount of money that you're going
8 to dedicate, when you get beyond kind of generalities then the
9 First Amendment privilege kicks in. We actually had this come
10 up in Judge Watson's case, and he ruled in a very well-reasoned
11 decision on this about the First Amendment privilege of the
12 party.

13 THE COURT: Ms. Carwile, why is this even relevant?

14 MS. CARWILE: It goes to standing, Your Honor.

15 THE COURT: How? Is standing one of your affirmative
16 defenses in this case?

17 MS. CARWILE: Yes, it is, Your Honor.

18 THE COURT: I don't recall that. All right. Go
19 ahead.

20 MS. CARWILE: I'm not asking for specifics on his
21 voter -- he discussed the absentee voting in his direct
22 testimony.

23 THE COURT: Because this case is about absentee
24 voting, in part.

25 MS. CARWILE: Correct.

1 THE COURT: So it would be hard not to -- you can't
2 use that as a basis to get into every aspect that -- of this,
3 some of which may even be protected. So tell me why this
4 particular issue is germane?

5 MS. CARWILE: It just goes to show that this was their
6 strategy and that this is their focus and that strategies can
7 change. I'm not -- my -- I'm not asking more questions besides
8 was this a strategy. I'm not going to go into any more detail
9 than that.

10 THE COURT: I understand. Your objection is
11 sustained.

12 MS. CARWILE: Thank you.

13 (Back in open court.)

14 THE COURT: Please continue, Ms. Carwile.

15 MS. CARWILE: Thank you, Your Honor.

16 BY MS. CARWILE:

17 Q. You also mentioned that you received calls from voters,
18 both regarding absentee ballots and provisional ballots; is
19 that correct?

20 A. Yes.

21 Q. And some of those calls relate to how to request an
22 absentee ballot; is that accurate?

23 A. Yes.

24 Q. And questions about they haven't received their ballot,
25 what should they do?

1 A. Right.

2 Q. And how to fill out their absentee ballot; is that
3 correct?

4 A. They usually don't ask us how to fill it out, no. They
5 ask us for a sample ballot, maybe, but they rarely ask us how
6 do I fill this out.

7 Q. Fair enough.

8 Do you expect to get those calls in 2016?

9 A. Yes.

10 Q. And that wouldn't depend on this litigation?

11 A. No.

12 Q. And with regard to provisional ballots, you get calls
13 about people having to have voted provisionally?

14 A. Yes.

15 Q. And you expect to get those calls in 2016?

16 A. Yes.

17 Q. Okay. And then on your -- you mentioned that there was
18 a burden because of 205 and 216 on your voter education
19 programs and something about having to reeducate voters. Could
20 you explain that a little bit more, please?

21 A. Sure.

22 Like I said, voters are creatures of habit. Once they
23 become used to filling out something one way, changes such as
24 the additional new fields to that form will -- they'll be
25 surprised and probably confused by why do I have to do this

1 now, or they'll just assume it's optional and not fill it out.
2 So when those changes are made, we have to go back and explain
3 to the same people we just explained to here's how you fill
4 this form out. We will have to go back to them and say, oh,
5 here's how you fill it out now; remember, there's these two
6 fields.

7 Q. How do you choose the people you call for that?

8 A. Again, it's going to be registered Democrats or people
9 who identify as likely to vote Democratic.

10 Q. Okay. And did you call people in 2014?

11 A. Yes.

12 Q. And it was based on these changes to the laws?

13 A. Yes.

14 Q. Is there anyone new that you would call in 2016 then?

15 A. Yes. We would call newly registered Democrats, newly
16 registered unaffiliated voters who we think are likely to vote
17 Democratic, and we provide them with education on what to do.

18 Q. Wouldn't you have to call those voters no matter what?

19 A. The new voters, yes. The old voters, we would not have
20 to call as many if the changes weren't in effect.

21 Q. You called those old voters, though, presumably in 2014;
22 would that be accurate?

23 A. People identified as likely to vote in midterm, yes. As
24 you recall, voter turnout was much lower in 2014. We
25 anticipated that a head of time so there would be fewer calls

1 than there would be in a presidential year.

2 Q. So you picked fewer people to call in 2014?

3 A. We based it on their voting history. A number of people
4 will only vote in presidential elections so we'll have a much
5 larger universe of people we would need to reach out to again
6 this time to explain the changes that have happened since 2012.

7 MS. CARWILE: Your Honor, I don't believe he has a
8 copy of the defense exhibits. Would he be able to get the
9 second binder of the defense exhibits?

10 THE COURT: Do you have that loose exhibit?

11 MS. CARWILE: I do, but it's multiple pages,
12 Your Honor.

13 THE COURT: Are you going to have him look at all the
14 pages or just select pages from that?

15 MS. CARWILE: Just select pages. However, this is
16 their interrogatories, and I would like to establish that these
17 are accurate.

18 THE COURT: All right.

19 THE WITNESS: I'm sorry, what was the exhibit number?

20 BY MS. CARWILE:

21 Q. Exhibit No. 26, please.

22 If you can just take a moment to flip through those
23 pages and see if you recognize it.

24 A. Okay.

25 Q. Do you recognize this document?

1 A. Yes. It appears to be the interrogatories we filed in
2 this case.

3 Q. If you could turn to page 5 of the interrogatories.

4 A. All right.

5 Q. Is the answer to number one in Zachary West, is that
6 you?

7 A. Yes.

8 Q. So did you provide the answers to these interrogatories?

9 A. Yes.

10 Q. And these appear to be an accurate copy of the
11 interrogatories?

12 A. Yes. An accurate copy?

13 Q. A true and accurate copy.

14 A. Yes.

15 MS. CARWILE: Your Honor, I would like to admit
16 Defendant's Exhibit 26.

17 THE COURT: Any objection, Mr. McTigue?

18 MR. McTIGUE: No. No objection, Your Honor.

19 THE COURT: So please proceed, Ms. Carwile.

20 The exhibit will be admitted. Exhibit 26 will be
21 admitted.

22 MS. CARWILE: Thank you, Your Honor.

23 BY MS. CARWILE:

24 Q. And I have a few questions about the last couple of
25 bullet points in here. So if you could turn to page 22, or if

1 you want to look on the screen, whichever is easier for you.

2 A. All right.

3 Q. And the first one says: No absentee ballot may be
4 rejected on the basis of failure to complete all five fields
5 when a Board of Elections is otherwise able to determine that
6 the ballot was cast by a qualified elector.

7 Did I read that correctly?

8 A. Yes.

9 Q. Are you suggesting that as long as there's at least one
10 identifying piece of information that allows the Board to know
11 the voter, that that would be sufficient?

12 A. I'm sorry, to what the voter?

13 Q. If all they put on was a name, would that be sufficient?

14 A. If they can identify that that ballot was cast by a
15 qualified elector and that the elector actually cast that
16 ballot, I think that should be sufficient, yes.

17 Q. But just having a name, would that enable someone to
18 know whether that elector cast that ballot?

19 A. I think you would have to ask a Board of Elections
20 official that.

21 Q. All right. And with regard to provisional ballots it
22 states: No provisional ballot may be rejected on the basis of
23 failure to complete all five fields when a Board of Elections
24 is otherwise able to determine that the ballot was cast by a
25 qualified elector.

1 Did I read that correctly?

2 A. Yes.

3 Q. And for this one are you also saying that as long as
4 there's at least one identifying piece of information, that
5 that should be sufficient?

6 A. I think what we are saying in this one is the same thing
7 as we said in the last one, that when a Board of Elections is
8 able to determine that a qualified elector who otherwise would
9 be able to vote casts that ballot, that they should not be
10 disenfranchised due to technical defects such as an empty
11 field.

12 Q. Is it also important to make sure that the person
13 casting that ballot is that person?

14 A. Yes. But, again, if the Board has enough information,
15 our position is that that person should be able to vote
16 regardless of whether they are -- they have met the technical
17 requirements or not.

18 Q. I understand that. I'm just making sure that -- it is a
19 valid concern that the person casting the ballot is who they
20 say they are.

21 A. Yes. And I think we agree with that. And we say in
22 here that the Board of Elections is otherwise able to determine
23 that the ballot was cast by a qualified elector.

24 Q. Okay. Thank you.

25 And then on the last page -- I'm sorry, not the last

1 page, but page 23.

2 A. Uh-huh.

3 Q. Is says that one of your requests is a unified poll book
4 must be used in each multi-precinct polling place, such that a
5 voter attempting to cast a ballot at the correct polling
6 location will not be deemed to be in the wrong precinct and
7 required to cast a provisional ballot.

8 Did I read that correctly?

9 A. Yes.

10 Q. Is that still your goal for this litigation?

11 A. Yes.

12 Q. And was that also your goal in a prior litigation by the
13 Ohio Democratic Party --

14 MR. McTIGUE: Let me let her finish the question.

15 THE COURT: Complete your question, Ms. Carwile.

16 BY MS. CARWILE:

17 Q. I was also asking if that was a goal in a different
18 case, the Ohio Democratic Party versus Husted that was tried in
19 November of 2015?

20 MR. McTIGUE: Objection, Your Honor. I don't see the
21 relevance of that here.

22 THE COURT: Sustained.

23 MS. CARWILE: May I confer?

24 THE COURT: Yes, you may.

25 MS. CARWILE: No further questions, Your Honor.

1 THE COURT: Any redirect, Mr. McTigue?

2 Thank you, Ms. Carwile.

3 MR. McTIGUE: Just one moment, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. McTIGUE:

6 Q. Mr. West, just a couple of questions.

7 Ms. Carwile asked you a series of questions regarding
8 activities conducted by the party, voter education, voter
9 protection, Get Out the Vote activities --

10 A. Uh-huh.

11 Q. -- for various years and whether or not the party
12 intended to conduct similar activities this year.

13 And the question -- and the question that I have for you
14 is whether or not these laws would impose a greater burden on
15 ODP with respect to those activities that Ms. Carwile asked you
16 about?

17 A. With respect to voter education and voter protection, I
18 think they would. With voter education, certainly, we will
19 have to go back and educate voters who only vote in
20 presidential elections, particularly in areas that see a higher
21 percentage of provisional ballots either because the population
22 is more transient, they are less likely to have I.D., or
23 whatever reason. We will have to go back and educate those
24 voters as to what they can expect when they go to the polls
25 this time due to the changed laws. Otherwise, we would not

1 have to conduct as large a voter education program, and we
2 would have more resources, particularly more federal resources,
3 which as I previously discussed are limited, to conduct our
4 core mission of registering voters, getting people out to vote.

5 Q. And I think -- I don't remember the exact question that
6 you were asked by Ms. Carwile, but part of your response had to
7 do with the party's activities when there's a close election;
8 in other words, after the polls close on Election Day.

9 A. Uh-huh.

10 Q. What activities -- or how do these laws that we're
11 talking about relate to the party's involvement with
12 post-election?

13 MS. CARWILE: Objection; beyond the scope.

14 THE COURT: I agree. Sustained.

15 MS. CARWILE: Thank you.

16 MR. McTIGUE: I have no further questions then,
17 Your Honor. Thank you.

18 THE COURT: Thank you, Mr. McTigue.

19 Ms. Carwile, do you have anything further?

20 MS. CARWILE: Nothing further, Your Honor.

21 THE COURT: Mr. West, thank you very much, sir. You
22 may be excused.

23 THE WITNESS: Thank you, Your Honor.

24 THE COURT: Mr. McTigue, that will conclude our
25 business for today.

1 How many witnesses remain on the Plaintiffs' witness
2 list at this point?

3 MR. CHANDRA: You mean in total, Your Honor?

4 THE COURT: Yes.

5 MR. CHANDRA: It would take us a little while to find
6 an answer for that because we've been eliminating people that
7 we don't need anymore.

8 THE COURT: How many do you have on tap for tomorrow?

9 MR. CHANDRA: So, Your Honor, we have three on tap for
10 tomorrow. And I'm glad you asked because one of the things we
11 wanted to advise the Court is we had originally been relying on
12 the Court's scheduling order about Fridays being off so when we
13 learned Monday night that that was not the case we were, you
14 know, scrambling to move things to try to fill up Friday. So
15 we're not certain at this point that we're going to wind up
16 having a full day of witnesses for Friday despite our best
17 efforts. And so one of our suggestions was going to be -- we
18 haven't had a chance to talk to opposing counsel -- is if the
19 Court wants to start a little later at 9:00, we can do that,
20 but that's kind of where we are with respect to Friday, is the
21 three witnesses.

22 THE COURT: I understand.

23 MR. CHANDRA: Sorry about that. We should be better
24 off next Friday.

25 THE COURT: It's not a problem, but I want you to be

1 clear, and I think that the record should be clear, that Friday
2 was going to be an off day when we thought that this was going
3 to be a two-week trial. And you'll recall that you told us
4 something quite the contrary later. And because the Court has
5 a two-month trial that -- that's a criminal trial that's
6 scheduled to begin on April 4, I have to be done with this
7 trial no later than April 1. So in order to accommodate that,
8 we have to go every day of the week, including Friday. And I'm
9 not going to -- depending on how we go, I'm looking into the
10 possibility of some Saturday sessions since we don't have a
11 jury. That's because we have to get this done. I don't right
12 now foresee that as a likelihood because you are calling
13 witnesses from your list and we're avoiding duplicative or
14 cumulative testimony, but given the compelling issues and the
15 fact that we need to get this done -- this is not one of those
16 cases where we can take two months off and then resume after my
17 first trial because whatever -- if a decision is made that is
18 going to impact in an affirmative way or in a way that may
19 require the Secretary and his Boards of Elections to take some
20 additional steps in preparation for the November election, that
21 needs to be done sooner rather than on the eve of the election.
22 So, you know, we will have to go as we will have to go.

23 Now, having said that, tomorrow we have the investiture
24 of Magistrate Judge Kim Jolson. That investiture lasts from --
25 will last from approximately 1:30 until -- I would say that it

1 will last from probably 1:30 at least until 2:30 because a
2 number of judges are speaking, and we are lawyers at our core
3 and, which Ms. Coulter will attest, means that we have many
4 words that we need to convey.

5 So we will convene tomorrow morning at 8:30 in Judge
6 Frost's courtroom. We are convening at 8:30 instead of 9:00,
7 Mr. Chandra, because Judge Frost has a criminal calendar at
8 noon so we have to be out of there at 11:45 at the absolute
9 latest. Originally I was going to have Judge Watson's
10 courtroom, but at the time on Monday when we -- when we made
11 the agreement, he was still in trial but thought that he would
12 be done by now. He's not so he has to have his own courtroom.
13 And I could use Judge Sargus' courtroom, but his courtroom is
14 serving as the overflow courtroom for this trial. So we just
15 have, you know, a perfect storm. So we'll work until 11:45,
16 we'll take an extended lunch. I'll ask everybody to be back in
17 Judge Frost's courtroom by, you know, 2:30 so that we can
18 resume. We're going to resume as soon as -- as soon as the
19 investiture is completed, and I would like to work until 5:00.
20 So as would be said, bring me your witnesses.

21 MR. CHANDRA: Okay. We will do that, Your Honor.

22 There's one other thing that I would like to advise you
23 of that I haven't had a chance to or with opposing counsel with
24 respect to this whole Friday issue.

25 Before we started trial I had offered Judge Polster in

1 Cleveland, who is doing a mediation in a very sensitive matter
2 for Judge Oliver Friday, April 1, and that got scheduled with
3 the parties and lawyers coming from around the country. So I
4 wanted the Court to just be aware that I have that obligation,
5 I can't change it. I'm going to work with my co-counsel to try
6 to -- assuming we're still, you know, trying to wrap up on that
7 day, you know, I'm going to try to work with them on that, but
8 I just wanted everybody to be aware of that, with the Court's
9 permission.

10 THE COURT: I mean, there are -- there are four of
11 you -- there are five of you on the Plaintiffs' side who
12 represent the Plaintiffs. So if you are out, Mr. Chandra,
13 I'm -- I have no doubt that your colleagues will carry the
14 banner forward. And so I understand, and you are excused for
15 that day.

16 MR. CHANDRA: Okay. Thank you, Your Honor.

17 Then I also want to report I'm never this optimistic at
18 this point in a trial, but actually we do believe that we have
19 covered a lot more territory than we thought we would by now.
20 And, particularly with the Court's facilitation on the
21 stipulations, we do think that we're going to be able to pick
22 the pace up and avoid duplicative testimony over the course of
23 next week. So we actually feel that even though we have a lot
24 still more to introduce, we do feel that we have made good
25 progress in the case.

1 THE COURT: Okay. I have every optimism that we
2 will -- well, we have -- we have eleven more trial days, and
3 that's not even counting Saturdays. So if we count Saturdays,
4 we have at least 13 more trial days and so, you know, I will
5 make a determination sometime during the week of the 21st
6 whether the 26th of March and April 2 will also be trial days.
7 I'll make that determination in conjunction with counsel. Not
8 in conferring with counsel, but in conjunction with counsel in
9 the sense that if you all are moving along at a clip that looks
10 like we'll be able to finish on the first, we won't have to.
11 But if we have the kind of delays that we had with the one
12 witness, I'm just going to make -- I'm going to make a sua
13 sponte decision for Saturday sessions.

14 Ms. Richardson?

15 MS. RICHARDSON: Yes, Your Honor?

16 THE COURT: Anything from the Defense?

17 MS. RICHARDSON: No, Your Honor. Thank you.

18 THE COURT: Thank you.

19 Now, for tomorrow's witnesses, are there any Board of
20 Election -- current Board of Election personnel who are
21 scheduled to be here?

22 MS. GENTRY: Yes, Your Honor. All three witnesses
23 are, I believe, current personnel of Boards of Elections.

24 THE COURT: Okay. So since we kind of have a good
25 sense now how to move through these examinations with dispatch,

1 I'll leave it to counsel -- we're ending early for us today,
2 almost an hour earlier than we ended yesterday. It's only
3 5:15. So I will ask counsel to confer with one another so we
4 can get on top of the documents and we'll know what documents
5 you can stipulate to and which ones there will have to be
6 further examination on.

7 MS. GENTRY: Yes, Your Honor.

8 THE COURT: So we're all square on the boxes being
9 moved because they have to come in here this evening and set
10 up.

11 MS. GENTRY: Yes, Your Honor.

12 THE COURT: And I don't know if any of you have ever
13 observed an investiture, but if you get the opportunity to see
14 Judge Jolson's investiture, I would urge you to observe it if
15 there is space and you otherwise have time.

16 Thank you very much, everyone, for working so
17 cooperatively and collaboratively both among yourselves and
18 with the Court so we could continue to move with some dispatch
19 while at the same time not sacrificing quality.

20 (Proceedings concluded at 5:17 p.m.)

21 - - -
22
23
24
25

C E R T I F I C A T E

We do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable Algenon L. Marbley, Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by us in stenotypy and transcribed by us or under our supervision.

s/Denise Errett, FCRR
Denise Errett, FCRR
Official Federal Court Reporter

s/Darla J. Coulter, RMR
Darla J. Coulter, RMR

DATE: March 21, 2016